76

Supreme Court, U.S.
FILED
07-797 DEC 11 2007
OFFICE OF THE CLERK

No. 07-_____

In The
Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL
OF THE STATE OF NEW HAMPSHIRE,
IN HER OFFICIAL CAPACITY,

Petitioner,

v.

SPGGC, LLC; US BANK N.A.; METABANK,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

Kelly A. Ayotte
Attorney General

ANNE M. RICE*
Associate Attorney General

DAVID A. RIENZO
Assistant Attorney General
N.H. DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3643
Attorneys for Petitioner

**Attorney of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Circuit correctly interpreted 12 U.S.C. § 24, Seventh and the Home Owners' Loan Act, 12 U.S.C. § 1461 *et seq.* to preempt state regulation of a third party non-bank affiliate of a national bank or national thrift when that affiliate is neither a bank nor thrift nor an operating subsidiary of either.

2. Whether the First Circuit correctly interpreted the Supreme Court's ruling in *Watters v. Wachovia Bank N.A., et al.*, 127 S.Ct. 1559 (2007) when it ruled that New Hampshire's Consumer Protection Act is preempted as related to the sale of the Simon Gift-Card by SPGGC.

3. Whether congressional silence on the question of whether a federal agency may preempt the laws of a sovereign state constitutes an "intelligible standard" such that the agency's actions preempting state laws do not violate the nondelegation doctrine.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Petitioner is Kelly Ayotte, Attorney General of the State of New Hampshire, who was sued in her official capacity.

Respondents are SPGGC, LLC, US Bank N.A., and MetaBank.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, no corporate disclosure statement is required as the filing party is a governmental entity.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING IN THE COURT BELOW	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
A. THE RULING RELATES TO AN IMPORTANT MATTER OF FEDERAL LAW, AND CALLS INTO QUESTION THE VALIDITY OF NUMEROUS LONG-ESTABLISHED STATE LAWS	6
B. THE RULING IS NOVEL, AND IS BASED UPON THIN AUTHORITY	9
C. THE RULING OFFENDS THE NON-DELEGATION DOCTRINE	11
D. THE RULING CONFLICTS WITH DECISIONS IN OTHER CIRCUITS	13
1. Interpretation of 12 U.S.C. § 24, Seventh	14

TABLE OF CONTENTS–Continued

Page

2. Interpretation of *Watters* 16

CONCLUSION 17

APPENDIX

SPGGC, LLC, et al. v. Ayotte, 428 F.3d 525 (2007) ..... App. 1

SPGGC, LLC, et al. v. Ayotte, 443 F.Supp.2d 197 (D.N.H., 2006) ..... App. 25

SPGGC, LLC v. Blumenthal, ___ F.3d ___, WL 3036812 (2d Cir. 2007) ..... App. 50

ORDER denying petition for rehearing and rehearing *en banc* ..... App. 76

TABLE OF AUTHORITIES

Page

CASES

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 11

Cades v. H&R Block, 43 F.3d 869 (4th Cir. 1994) 10

Chevron, U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 13

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 11

Mistretta v. United States, 488 U.S. 361 (1989) 11

Panama Refining Co. v Ryan, 293 U.S. 388 (1935) 11

SPGGC v. Blumenthal, 408 F.Supp.2d 87 (D.Conn. 2006) 14

SPGGC, LLC v. Blumenthal, ___ F.3d ___, WL 3036812 (2d Cir. 2007) 14, 15, 17

SPGGC, LLC, et al. v. Ayotte, 428 F.3d 525 (2007) 15, 16

Watters v. Wachovia Bank, N.A., et al., 127 S.Ct. 1559 (2007) ..... *passim*

STATUTES

12 U.S.C. § 221a(b) 17

12 U.S.C. § 24a(g)(3)(A) 17

12 U.S.C. § 24, Seventh 11, 12, 14, 15, 17

28 U.S.C. § 1254(1) (2002) 1

TABLE OF AUTHORITIES–Continued

Page

Home Owners' Loan Act, 12 U.S.C. § 1461 5

National Bank Act, 12 U.S.C. § 21 ..... 5, 9, 14, 16

N.H. Rev. Stat. Ann. Ch. 361-A ..... *passim*

N.H. Rev. Stat. Ann. Ch. 358-A ..... *passim*

N.H. Rev. Stat. Ann. Ch. 479-B 8

OTHER AUTHORITIES

Preemption Determination (Michigan Motor Vehicle Sales Act) 66 Fed. Reg. 28,593 (May 23, 2001) 10

United States Constitution, Art. I, § 1 11

United States Constitution, Art. VI, cl. 2 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a Writ of *Certiorari* issue to the United States Court of Appeals for the First Circuit to review the judgment in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 448 F.3d 525 (1st Cir. 2007). It is set forth in the Appendix at App. 1 to App. 24. The order of the United States District Court for the District of New Hampshire holding New Hampshire's Gift Certificate Law to be preempted by the National Bank Act and the National Home Owners' Loan Act is reported at 443 F.Supp.2d 197 (D.N.H., 2006), and is set forth in the Appendix at App. 25 to App. 48.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on May 30, 2007. The State of New Hampshire timely moved for rehearing and rehearing en banc, which motions were denied on September 13, 2007. Order, Appendix at App. 76.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (2002) to review a civil judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl. 2, provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[Relevant provisions of NH Rev. Stat. Ann. 358-A, as amended]

358-A:1 Definitions. – As used in this chapter, the following terms shall have the following meaning:

. . .

IV-a. "Gift certificate" means a written promise given in exchange for payment to provide the bearer, upon presentation, goods or services in a specified amount.

Source. 1970, 19:1. 1994, 226:1, eff. July 26, 1994. 2003, 193:1, eff. Jan. 1, 2004.

358-A:2 Acts Unlawful. – It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following:

. . .

XIII. Selling gift certificates having a face value of $100 or less to purchasers which contain expiration dates. Gift certificates having a face value in excess of $100 shall expire when escheated to the state as abandoned property pursuant to RSA 471-C. Dormancy fees, latency fees, or any other administrative fees or service charges that have the effect of reducing the total amount for which the holder may redeem a gift certificate are prohibited. This paragraph shall not apply to season passes.

Source. 1970, 19:1. 1973, 383:2. 1986, 137:1. 1994, 226:2, eff. July 26, 1994. 1996, 165:1, eff. Jan. 1, 1997. 1997, 302:1, eff. Jan. 1, 1998. 1999, 49:1, eff. Jan. 1, 2000. 2002, 276:1, eff. July 17, 2002. 2003, 193:2, eff. Jan. 1, 2004. 2004, 228:1, eff. Aug. 10, 2004.

358-A:3 Exempt Transactions; etc. – The following transactions shall be exempt from the provisions of this chapter:

I. Trade or commerce that is subject to the jurisdiction of the bank commissioner, the director of securities regulation, the insurance commissioner, the public utilities commission, the financial institutions and insurance regulators of other states, or federal banking or securities regulators who possess the authority to regulate unfair or deceptive trade practices. This paragraph includes trade or commerce under the jurisdiction of, and regulated by, the bank commissioner pursuant to

RSA 361-A, relative to retail installment sales of motor vehicles.

Source. 1970, 19:1. 1973, 383:3, 4. 1985, 172:1, eff. July 26, 1987. 1996, 165:2-4, eff. Jan. 1, 1997. 2002, 276:2, eff. July 17, 2002. 2004, 141:1, eff. July 23, 2004.

STATEMENT OF THE CASE

The New Hampshire Consumer Protection Act, N.H. Rev. Stat. Ann. Ch. 358-A (the "CPA") was amended, effective January 1, 2004, to outlaw the sale of gift certificates bearing expiration dates or administrative or other fees that reduce the redeemable value of those certificates. The CPA specifically exempts from its jurisdiction all banks or other financial institutions that are subject to the jurisdiction of state or federal banking regulators. N.H. Rev. Stat. Ann. Ch. 358-A:3, I.

SPGGC, LLC ("Simon") is a subsidiary of Simon Property Group, a real estate trust which specializes in the ownership and management of shopping malls around the USA and worldwide.

Simon sells the "Simon GiftCard," a gift certificate that resembles a credit card or debit card, bears the Visa logo, and carries an expiration date and fees that reduce the redeemable value of the gift certificate, contrary to New Hampshire law.

When New Hampshire sought to enforce its CPA regarding Simon's sales of the Simon GiftCard, Simon filed suit in U.S. District Court for the District of New Hampshire stating that the GiftCard is issued by a national bank, and therefore New Hampshire's CPA is preempted. The District Court ruled in favor of Simon, saying that US Bank N.A. and Metabank, the issuing banks (the "Banks") are authorized by the National Bank Act and the Home Owners' Loan Act[1] to engage agents to sell bank products, and that the CPA conflicts with this authority. The District Court further held that the restrictions imposed by the CPA were an effort by the State to regulate the terms of the cards issued by the Banks, despite the explicit exemption for banks and other financial institutions set out in the CPA. The panel of the Court of Appeals for the First Circuit agreed with the District Court on both of these issues.

---

[1] The National Bank Act, 12 U.S.C. § 21, *et seq.* and the Home Owners' Loan Act, 12 U.S.C. § 1461, *et seq.* are both identified as sources for federal preemption in this matter. As the preemption analysis is functionally the same, for purposes of the argument, reference to the National Bank Act should also be applied to the Home Owners' Loan Act.

REASONS FOR GRANTING THE WRIT

A. THE RULING RELATES TO AN IMPORTANT MATTER OF FEDERAL LAW, AND CALLS INTO QUESTION THE VALIDITY OF NUMEROUS LONG-ESTABLISHED STATE LAWS.

It is difficult to overstate the importance of this ruling. Read broadly, it may be applied to much more than simply the sale of gift certificates by a shopping mall. The preemptive reach of this ruling has the potential to undo decades of legislative efforts designed to protect consumers from unfair or deceptive banking and lending practices.

For example, in order to curtail such unfair or deceptive practices in the sale of automobiles by new- and used-car dealers, New Hampshire has established a comprehensive regulatory framework governing how these dealers may issue credit, and bars the inclusion of certain unfair or unconscionable terms from being included in retail installment sales contracts. *See* N.H. Rev. Stat. Ann. Ch. 361-A:7, I (all retail installment sales contracts must be in writing; only certain size type faces may be used); N.H. Rev. Stat. Ann. Ch. 361-A:7, II (all financial details must be explicitly described); N.H. Rev. Stat. Ann. Ch. 361-A:7, III – IV-a (specifying how insurance may be included and how refunds for unused insurance coverage are to be refunded); N.H. Rev. Stat. Ann. Ch. 361-A:7, V (identifying what fees are allowed in case of default by the borrower); N.H. Rev. Stat. Ann. Ch. 361-A:7, VI (requiring that all blank spaces be filled

before the purchaser signs the contract); N.H. Rev. Stat. Ann. Ch. 361-A:7, VII (statement of dates and amounts of payments, amount unpaid, or both must be delivered to borrower within five days of a request therefore); N.H. Rev. Stat. Ann. Ch. 361-A:7, VIII (rendering unenforceable specified unconscionable terms relevant to confession of judgment, acceleration of indebtedness, consent to repossession, waiver of right of action against lender or holder of contract for illegal acts committed in collection or repossession, other waiver of rights of action); N.H. Rev. Stat. Ann. Ch. 361-A:7, IX (prohibiting and invalidating other unfair terms in the contract such as any provision permitting the holder of the contract to waive the borrower's right to notice of default; establishing the circumstances under which indebtedness may be accelerated; prohibiting clauses which may allow the holder to declare a note in default when a payment is delinquent for fewer than ten days; prohibiting capitalized repairs; prohibiting prepayment penalties in a contract that has a term of less than six years).

It is noteworthy that N.H. Rev. Stat. Ann. Ch. 361-A was enacted in 1961, and has been in full force and effect since then. These rules govern the terms of all retail installment sales contracts offered in New Hampshire regardless of whether the ultimate lender operates under a federal or state charter.[2] Under the

---

[2] In New Hampshire, automobile dealers must register with the New Hampshire Banking Commission, as it is the dealer that originates the loan, and is the party that is eligible to

(Continued on following page)

rule established by the First Circuit, should the dealer be deemed to be an agent of the lender, this comprehensive consumer protection regime – and others where the State regulates the activities of third party sellers of bank products, including mortgage brokers – will be rendered nullities.[3]

This ruling by the First Circuit substantially alters the current balance of federal-state regulations in the dual banking system, and changes the well-established rules of federalism by establishing more restrictive limits on the State's ability to regulate banking and lending activities.

---

receive the borrower's payments until the loan is assigned to a lender. Recently some dealers in New Hampshire have taken the position that they are acting as agents of the ultimate lender, raising questions regarding the applicability of these state laws to these dealers when the ultimate lender is a national bank.

[3] It is worth noting that in response to the recent foreclosure crisis, in July of this year New Hampshire enacted N.H. Rev. Stat. Ann. Ch. 479-B, which regulates those who attempt to "rescue" troubled homeowners from foreclosure. In some cases, these "foreclosure rescue" firms have misrepresented the terms of the loans they have brokered to these troubled homeowners, making foreclosure more, not less, likely. To the extent that these firms could be deemed to be "agents" of a nationally chartered lender, this new law could also be negated under the First Circuit's rule.

B. THE RULING IS NOVEL, AND IS BASED UPON THIN AUTHORITY.

The ruling constitutes a novel interpretation of the scope of preemption under the National Bank Act. The District Court below ruled that an effort by the State to control the actions of a third party non-bank was in fact an effort to regulate the actions of a national bank and a federally-chartered thrift. Appendix at App. 47. It made this ruling in spite of the explicit exemption for banks, both state chartered and federally chartered, in the law the State sought to enforce. *See* N.H. Rev. Stat. Ann. Ch. 358-A:3, I. The solution to this perceived interference in the actions of federally-chartered financial institutions was to find that the State's actions are preempted by the National Bank Act, despite the fact that the target of the State's enforcement actions was not a national bank, national thrift, or an operating subsidiary of either. Instead, it was a third party non-bank entity that is in the business of operating shopping malls.

Prior to the affirmation by the First Circuit, the District Court below was the only federal court to have ruled that a mere contractual relationship between a national bank and a non-bank third party invokes the doctrine of federal preemption under the Bank Act and preempts a valid state law that affects that non-bank third party but explicitly exempts the activities of a national bank or thrift.

The novelty of this ruling is borne out by the dearth of authority the First Circuit relies upon in its affirmance. The Court of Appeals cites *Cades v. H&R Block,* 43 F.3d 869, 873-74 (4th Cir. 1994), but notes that the Fourth Circuit merely "suggested" that banks may use agents to act sell their products. Appendix at App. 14. In fact, the *Cades* court never discussed the question at issue here – whether state law no longer applies to a third party agent when that agent sells the product of a national bank. That the only case cited by the First Circuit to support its ruling never considered the actual question at issue underscores the novelty of that Court's ruling.

The authority primarily relied upon by the First Circuit is an opinion letter written by the Office of the Comptroller of the Currency (the "OCC") and published in the Federal Register. *Id. See* Preemption Determination (Michigan Motor Vehicle Sales Act) 66 Fed. Reg. 28,593 (May 23, 2001).

Thus, the First Circuit is the first federal appellate court in the nation, and only the second federal court in the nation, to adopt the OCC's broad interpretation of preemption relative to the acts of third party, non-bank agents. It is noteworthy that for its authority, the OCC -- and, by reference, the First Circuit – relies merely on an opinion letter, rather than an act of Congress, or a rule promulgated subject to the administrative rulemaking process with its requirements of notice and comment.

C. THE RULING OFFENDS THE NONDELEGATION DOCTRINE.

Article I, § 1 of the U.S. Constitution vests "all legislative Powers herein granted . . . in a Congress of the United States." Accordingly, the Supreme Court has long held that when Congress establishes the authority for agencies to wield decisionmaking power, it must do so with care. *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928). Congress must "lay down by legislative act an *intelligible principle* to which the person or body authorized to [so act] is directed to conform." *Id.* (Emphasis added). There must also be a clear limit on the discretion of that agency to engage in legislative acts. *Mistretta v. United States,* 488 U.S. 361, 373 n.7 (1989). ("In *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935) the Court concluded that Congress had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power.").

Congress has been silent on the issue of whether and how the OCC may preempt the laws of a sovereign state regarding third party agents of a national bank. Thus, there is no "legislative act" setting out an "intelligible principle" to which the OCC is "directed to conform."

The First Circuit found preemption based on 12 U.S.C. § 24, Seventh, but that provision authorizes a national bank "to exercise by its board of directors or

duly authorized officers or agents, *subject to law,* all such incidental powers as shall be necessary to carry on the business of banking." *Id.* (Emphasis added).

The phrase "subject to law" does not serve to preempt state law. Rather, it underscores that agents of a national bank are obliged to abide by applicable law.

Furthermore, this passage contains no provisions delegating to the OCC the authority to preempt a valid state law that applies to third party agents of a national bank. It provides no "intelligible principle" governing either granting the OCC legislative authority or limiting its discretion in this area. This silence by Congress should not be construed as a sufficient delegation of authority to the regulatory agencies to authorize those agencies to preempt the valid laws of a sovereign state, especially when those valid laws are aimed at entities that are not subject to the jurisdiction of the regulatory agencies that claim preemptive authority.

This case is not the same as *Watters v. Wachovia Bank, N.A., et al.*, 127 S.Ct. 1559 (2007). That case focused on the authority of state banking regulators to exercise visitorial powers on operating subsidiaries of national banks. This case, in contrast, is about the authority of the state when a third party agent of a bank runs afoul of state law.

The corporate structure of operating subsidiaries places them under the direct control of the national bank, whereas third party agents have at most only a

contractual arrangement with the national bank. Thus, the argument that, because the OCC can directly regulate the bank and that those regulations will immediately apply to the subsidiary, is absent when the entity in question happens to be a third party agent that is not part of the corporate structure of the bank.

This is an important question of federal law that this Court should decide. It will have implications for other agency delegations and whether agency preemption determinations should be given deference as set out in *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), absent clear delegation by Congress of its legislative authority, and absent a legislatively adopted intelligible principle of limitation of the agencies' discretion.

D. THE RULING CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

The Court of Appeals for the Second Circuit has reviewed a Connecticut statute that effectively mirrors the New Hampshire statute that was held preempted by the First Circuit and is the subject of this appeal. Yet, in this companion case, the Second Circuit came to a markedly different conclusion. *See*

SPGGC, LLC v. Blumenthal, ___ F.3d ___, WL 3036812 (2d Cir. 2007).[4]

There are two points of disagreement between the First Circuit and the Second Circuit. One revolves around the effect of the authority granted to national banks by the National Bank Act § 24, Seventh, and the other relates to the scope of this Court's recent holding in *Watters v. Wachovia Bank, N.A., et al.*, 127 S.Ct. 1559 (2007).

1. Interpretation of 12 U.S.C. § 24, Seventh

The First Circuit reads the authority granted in 12 U.S.C. § 24, Seventh for a national bank to utilize

---

[4] The distinguishing facts identified by the First and Second Circuits are that, in the New Hampshire matter, US Bank N.A. and Metabank (the "Banks") were granted intervenor status. It is noteworthy, however, that in ruling on SPGGC, LLC's Motion to Reconsider in the Connecticut matter, Judge Underhill explicitly stated that, while a different preemption analysis "might be required" were the Banks plaintiffs in the Connecticut matter, Simon's affiliation with multiple federally-chartered financial institutions did not alter the analysis, and Connecticut's Gift Certificate Law was not preempted. The Court reasoned that the Bank Act applies to federally chartered banks and their operating subsidiaries, and Simon is neither. *SPGGC v. Blumenthal*, 408 F.Supp.2d 87, 95 (D.Conn. 2006). On appeal, the Second Circuit upheld this line of reasoning, and held that the Connecticut Gift Card law applied to Simon, not the Banks, as related to the prohibition on administrative fees, but that the record was insufficient as to the prohibition on expiration dates. The Court therefore remanded this portion of the case for further proceedings. *Blumenthal*, WL 3036812 at *6.

"duly authorized officers or agents" to exercise its incidental powers to mean that any state law that limits the actions of such an "agent" is subject to pre-emption under the NBA. *SPGGC, LLC, et al. v. Ayotte,* 428 F.3d 525, 532-533 (1st Cir. 2007) ("Even if the CPA does not directly prohibit USB[ank] from engaging in [the sale of certain giftcards], it does so indirectly by prohibiting Simon from acting as USB's agent.").

The Second Circuit, on the other hand, while not disputing that a bank may employ an agent to carry out its business pursuant to 12 U.S.C. § 24, Seventh, requires more than the First Circuit's formulaic approach. *SPGGC, LLC v. Blumenthal,* ___ F.3d ___, WL 3036812 at *5 (2d Cir. 2007) ("It does not follow that a state's attempt to regulate the *third party's* conduct is necessarily preempted as it would be if directed toward the bank or an operating subsidiary.") (emphasis in the original). Rather, according to the Second Circuit, the state law in question must do more than merely regulate the activities of an agent. The law must actually affect the national bank's exercise of its authorized powers.[5]

---

[5] New Hampshire believes that had this rule been applied in New Hampshire, the CPA would not have been held to be preempted, as the law places no limits on the activities that the banks themselves may carry out. Thus, the Banks are entirely free to sell stored value cards in New Hampshire or to New Hampshire consumers over the internet, as Simon now does, provided they do so themselves or through a third party agent, provided they engage an agent that is also exempt from the CPA.

Thus, while preemption of state laws that regulate an agent of a national bank are summarily preempted in the First Circuit's analysis, the Second Circuit requires a further analysis of whether the state law in question merely limits the actions of the third party agent or actually hinders the bank's ability to engage in an authorized activity. Where these two courts of appeals have come to conflicting decisions on an important federal question, this question is ripe for resolution by this Court.

2. Interpretation of *Watters*.

Both the First Circuit and the Second Circuit look to this Court's ruling in *Watters* for guidance. The First Circuit found preemption after concluding that the activity being regulated is more important than to whom the law applies. *Ayotte*, 428 F.3d at 532 ("We have never held that the preemptive reach of the [National Bank Act] extends only to the national bank itself. Rather, in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank's *powers*. . . .") (citing *Watters*, slip op. at 13) (Emphasis in the original).

The Second Circuit cites to exactly the same sentences in *Watters,* but then goes on to point out that operating subsidiaries of a national bank have a special status under the law. ("[I]t would be a mistake to read *Watters* so broadly as to obscure the unique

role assigned to operating subsidiaries in the context of national banking regulation.") *Blumenthal*, WL 3036812 at *5. The Second Circuit then draws a distinction between SPGGC's status and that of operating subsidiaries pursuant to 12 U.S.C. § 24a(g)(3)(A), and other affiliates as defined in 12 U.S.C. § 221a(b). *Id.* Based upon this distinction, the Second Circuit concludes that Simon has no "special status" under the NBA. *Id.* The Second Circuit then goes on to find no preemption to the extent that the Connecticut law applies only to Simon, as described in the previous section.

Thus, there is a disagreement between the circuits regarding the scope of the ruling in *Watters*. The State requests that the Court grant this petition to clarify the meaning of 12 U.S.C. § 24, Seventh, as well as the controversy regarding the scope of the Court's ruling in *Watters*.

CONCLUSION

The First Circuit erred by issuing such an important ruling with such sweeping consequences based on the thinnest authority, and without considering whether the Congress delegated to the OCC or the OTS the power to preempt long established state laws designed to protect the state's consumers. For the

above reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

December 11, 2007

Kelly A. Ayotte
Attorney General

By her attorney

ANNE M. RICE
Associate Attorney General
NEW HAMPSHIRE DEPT.
OF JUSTICE
33 Capitol Street
Concord, New Hampshire 03301
603 271-3650

C.A.1 (N.H.),2007.

United States Court of Appeals, First Circuit.
SPGGC, LLC; Metabank; U.S. Bank, N.A.,
Plaintiffs, Appellees,
v.
Kelly A. AYOTTE, New Hampshire Attorney General,
Defendant, Appellant.
No. 06-2326.

Heard April 6, 2007.
Decided May 30, 2007.

David A. Rienzo, with whom Richard W. Head, Senior Assistant Attorney General, New Hampshire Department of Justice, were on brief, for appellant.

Paul W. Shaw, with whom Margaret M. Pinkham and Brown Rudnick Berlack Israels LLP, was on brief, for appellee SPGGC, LLP.

Christine B. Cesare, with whom Bryan Cave LLP, Bruce Felmly, and McLane, Graf, Raulerson & Middleton, P.A., was on brief, for appellee Metabank.

James R. McGuire, with whom Morrison & Foerster LLP, was on brief, for appellee U.S. Bank, N.A.

Douglas B. Jordan, Senior Counsel, Litigation Division, Office of the Comptroller of the Currency, with whom Julie L. Williams, Chief Counsel, Daniel P. Stipano, Deputy Chief Counsel, and Horace G. Sneed, Director, Litigation Division, was on brief for the Office of the Comptroller of the Currency, as amicus curiae in support of appellee U.S. Bank, N.A.

Before TORRUELLA, Circuit Judge, TASHIMA,* Senior Circuit Judge, and LIPEZ, Circuit Judge.

TORRUELLA, Circuit Judge.

This is a case about the power of a state to regulate activities of national banks and national thrifts if these activities are carried out by third-party agents. New Hampshire passed a statute restricting the sale of "gift certificates," including stored value giftcards issued by national banks and national thrifts, that carry expiration dates or are subject to administrative fees. New Hampshire Consumer Protection Act, N.H.Rev.Stat. Ann. § 358-A:2 ("New Hampshire CPA"). Plaintiffs SPGGC, LLC, a mall owner ("Simon"), later joined by U.S. Bank, a national bank ("USB"), and Metabank, a national thrift, filed suit against Kelly A. Ayotte, Attorney General of New Hampshire, seeking injunctive relief and a declaratory judgment that the New Hampshire CPA was preempted by the National Banking Act, 12 U.S.C. § 1 *et seq.*, the Home Owners Loan Act, 12 U.S.C. § 1461 *et seq.* ("HOLA"), and the regulations promulgated thereunder.[1] The district court granted summary judgment to Simon, Metabank, and USB, concluding that the New Hampshire CPA was

---

* Of the Ninth Circuit, sitting by designation.

[1] Simon also argued that the regulations violated the Commerce Clause. Because the district court did not reach this argument and because we agree with the district court that the New Hampshire CPA is preempted by federal law, we need not reach this argument.

preempted as applied to products sold by national banks and thrifts. After careful consideration, we affirm.[2]

I. *Background*

Simon is a subsidiary of the Simon Property Group, a retail shopping mall developer and manager. Simon manages the three largest shopping malls in New Hampshire, as well as a number of other malls throughout the United States. In 2001, Simon contracted with Bank of America ("BoA") to sell Simon-branded stored value giftcards.

Stored value giftcards come in two varieties: retail giftcards and bank-issued giftcards. Retail giftcards are similar to traditional gift certificates in that they are issued by a retailer, are serviced by a retailer or its agent, and can only be used at that retailer. Bank-issued giftcards may be sold by a retailer, but they are issued by a bank, typically carry the logo of a payment network such as Visa or MasterCard, and can be used at any location that accepts debit cards of the same payment network. The giftcards issued by BoA and sold by Simon were bank-issued giftcards. These cards carried an expiration date and were subject to administrative fees that reduced the redeemable value of the card after a

---

[2] We acknowledge the assistance provided to the Court by amicus curiae Office of the Comptroller of the Currency.

certain period of time or after certain events, such as the loss and replacement of the card.

Under the agreement between Simon and BoA, BoA was responsible for the design of the cards, and BoA was identified as the issuer of the giftcard. All proceeds from the sale of BoA-issued giftcards were remitted to Simon, who in turn paid BoA a "transaction fee" for each transaction involving a BoA-issued card. Simon was responsible for marketing, selling, and servicing the BoA-issued giftcards.

On November 1, 2004, Ayotte gave notice to Simon that the Attorney General intended to file an enforcement action pursuant to the New Hampshire CPA to halt the sale of the Simon-branded BoA-issued giftcards. The CPA provides in relevant part:

It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following:

* * *

> XIII. Selling gift certificates having a face value of $100 or less to purchasers which contain expiration dates. . . . Dormancy fees, latency fees, or any other administrative fees or service charges that have the effect of reducing the total amount for which the holder may redeem a gift certificate are prohibited.

> This paragraph shall not apply to season passes.

N.H.Rev.Stat. § 358-A:2. On November 12, 2004, Simon filed a declaratory judgment action and request for injunctive relief against Ayotte in the United States District Court for the District of New Hampshire, seeking a declaration that enforcement of the CPA against Simon for the sale of BoA-branded giftcards would be preempted by the National Banking Act. New Hampshire proceeded to file a civil complaint against Simon in the New Hampshire Superior Court on November 15, 2004, alleging that Simon violated the CPA by selling giftcards with an expiration date and administrative fees. Simon filed a motion to dismiss the civil complaint on the ground that its giftcards were not "gift certificates" within the definition of the CPA. The Superior Court found that the Simon-branded BoA-issued giftcards were "gift certificates" within the definition of the CPA, and denied Simon's motion to dismiss, but stayed all further proceedings pending the outcome of the federal action. On August 31, 2005, Simon moved for summary judgment in the federal declaratory judgment action.

In September 2005, Simon terminated its relationship with BoA, and entered into contracts with USB to sell Simon-branded USB-issued giftcards at Simon malls, and with Metabank to sell Simon-branded Metabank-issued giftcards over the internet. USB is a federally chartered bank ("national bank") regulated by the federal Office of the Comptroller of

the Currency ("OCC"). Metabank is a federally chartered thrift ("national thrift") regulated by the federal Office of Thrift Supervision ("OTS").

Simon's contract with USB states that USB shall be considered the "issuer" of the giftcards sold under the contract, and that the giftcards are to be "national bank products within the meaning of the National Bank Act for all purposes, including the principles of federal preemption." According to the contract, USB issues the giftcards and then provides a stock of cards to Simon. Simon then markets the giftcards to consumers. Consumers who wish to purchase a gift card provide Simon with some form of payment, which Simon remits to USB. Simon then electronically "loads" the stored value onto the card and gives the card to the consumer, along with the disclosures provided by USB. Simon is paid a commission for each gift card sold. From this point forward, the purchaser of the gift card has a contractual relationship only with USB. USB is responsible for servicing the card and is liable for charges upon it. Any fees associated with the card are set and collected by USB, and if the card is reported lost or misused, USB may be liable to the consumer for fraudulent charges. Simon has no authority under the contract to alter the terms and conditions of the agreement between USB and the consumer. Metabank's agreement with Simon is substantially similar to Simon's agreement with USB.

According to Metabank and USB, some amount of administrative fees are necessary to make their

giftcard business economically viable. In addition, Metabank and USB have stated that Visa, who provides payment processing services for the giftcards, requires that the cards include an expiration date. According to Metabank and USB, the expiration date provides security so that the card's identity can be verified by seeing if the card number and expiration date match in a database.

The USB giftcards themselves resemble a credit card in physical appearance. They are about 3 3/8 inches long by 2 1/4 inches wide. The card has the Visa logo along with a hologram in the front bottom right corner. Sixteen raised digits appear on the front of the card, below which is an expiration date. The top of the card identifies it as a "Simon Giftcard;" the USB logo is also prominently displayed. On the reverse of the card, there is a strip emblazoned with the Visa logo for the customer's signature and a statement that use of the gift card is governed by the terms of the "cardholder agreement," that an administrative fee of $2.50 per month will be deducted beginning thirteen months after the card is purchased, and that the card will expire on the date printed on the front of the card. The card also states: "This card is issued by and the property of U.S. Bank National Association, pursuant to a license from Visa U.S.A. Inc., and must be returned upon request."

The "U.S. Bank Simon Giftcard Cardholder Agreement" indicates that the agreement is between USB and the consumer. The agreement states the schedule of fees, the expiration date, indicates that

the card "may be used when making purchases from any merchant that accepts Visa debit cards," and states that USB "may be liable for failure to complete transactions." The agreement also explicitly limits USB's liability for certain transactions and notes that USB "may revoke the Giftcard at any time without cause or notice." The Agreement is printed on a brochure that accompanies the card. The brochure states that the card is "issued by USB," and that it may be purchased at a Simon mall or at the Simon website.[3]

Both Metabank and USB moved to intervene in the declaratory judgment action. The district court granted both parties' motions.

On August 1, 2006, the district court granted Simon's motion for summary judgment. The district court found that the National Bank Act and HOLA authorized nationally chartered banks and thrifts respectively to sell stored-value giftcards as a banking product, and that the New Hampshire CPA substantially frustrated the ability of Metabank and USB to sell giftcards in New Hampshire. As such, the district court found that the National Bank Act and HOLA preempted the CPA with respect to products issued by nationally chartered banks and thrifts.

---

[3] The Metabank-issued giftcard does not appear significantly different from the USB-issued card.

II. *Discussion*

We review a district court's determination that a state statute is preempted *de novo*. *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 139 (1st Cir.2000).

The doctrine of federal preemption is rooted in the Supremacy Clause, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Federal statutes and the regulations adopted thereunder have equal preemptive effect. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). A federal statute or regulation may preempt a state regulatory scheme in three relevant ways.[4] First, Congress can expressly preempt state law by explicit statutory language. *Barnett Bank of*

---

[4] A fourth species of preemption, "complete preemption," exists where a federal cause of action has completely supplanted a state law cause of action, and thus converts the state claim into a federal claim. *See, e.g., Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Complete preemption allows a plaintiff to bring a previously state-law claim into federal court under federal question jurisdiction, 28 U.S.C. § 1331. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 24, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). No party disputes that the district court had subject-matter jurisdiction over Simon's claims under § 1331 because they raise federal questions. Accordingly, the doctrine of complete preemption is inapplicable here.

Marion County, N.A. v. Nelson, 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). Second, Congress can enact a regulatory scheme "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," *id.* at 31, 116 S.Ct. 1103 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)), also known as "field preemption". In such cases, state regulation will be invalid even if it does not directly conflict with federal laws or regulations. *See, e.g., Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 167-68, 62 S.Ct. 491, 86 L.Ed. 754 (1942). Third, "federal law may be in 'irreconcilable conflict' with state law," *Barnett Bank,* 517 U.S. at 31, 116 S.Ct. 1103 (quoting *Rice v. Norman Williams Co.,* 458 U.S. 654, 659, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982)), also known as "conflict preemption." This may occur when compliance with both state and federal statutes and regulations is a physical impossibility, or when compliance with the state statute would frustrate the purposes of the federal scheme. *Id.* Simon, USB, and Metabank argue that conflict preemption prohibits Ayotte from enforcing the New Hampshire CPA against Simon because the CPA conflicts with federal statutes and regulations authorizing national banks and thrifts to issue gift cards with expiration dates and administrative fees and to sell the cards through third party agents. Because USB and Metabank's activities are regulated under different statutory schemes, we address their preemption claims separately.

A. The National Bank Act

The National Bank Act provides that a nationally chartered bank shall have the power "[t]o exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24, Seventh. The Supreme Court has consistently recognized this grant of incidental powers as a "grant[] of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank,* 517 U.S. at 32, 116 S.Ct. 1103; *see also Franklin Nat'l Bank v. New York,* 347 U.S. 373, 378, 74 S.Ct. 550, 98 L.Ed. 767 (1954) (deciding that a national bank's incidental power to advertise for deposits preempts state law limiting such advertising); *First Nat'l Bank v. California,* 262 U.S. 366, 369-70, 43 S.Ct. 602, 67 L.Ed. 1030 (1923) (finding that a national bank's statutory deposit-taking power preempts state statute limiting its ability to take deposits). Thus, a state law may be preempted by the National Bank Act when it frustrates or limits the ability of a national bank to exercise its statutorily granted powers. *See Barnett Bank,* 517 U.S. at 33-34, 116 S.Ct. 1103. Accordingly, to determine whether the National Bank Act preempts the enforcement of the New Hampshire CPA, we must first determine whether a national bank's enumerated and incidental powers include the issuance of stored-value giftcards with expiration dates and administrative fees and the marketing and sale of those giftcards through third party agents. If a national bank has these powers, we

must then determine whether the CPA limits the bank's ability to exercise that power.

There is little dispute in this case that a national bank has the power to issue stored value cards that carry expiration dates and administrative fees. The OCC has determined that the issuance and sale of electronic stored value systems, such as giftcards, is an activity incidental to the business of banking. 12 C.F.R. § 7.5002(a)(3); OCC Bulletin No. 98-31, Guidance on Electronic Financial Services & Consumer Compliance, (July 30, 1998), *available at*1998 WL 460874 at *8. Furthermore, the OCC has issued regulations that require the disclosure of expiration dates and administrative fees on giftcards, which indicates that the OCC expects that cards might carry expiration dates and fees, and that they are not prohibited from doing so. OCC Bulletin 2006-34, Gift Card Disclosures (Aug. 14, 2006), *available at*2006 WL 2384741 at *2; OCC Bulletin No. 96-48, Stored Value Card Systems (Sept. 10, 1996), *available at* 1996 WL 528481 at *2 ("Each [stored value] system could have specific features such as limits on the amount of electronic cash that can be stored or cards that expire after some established time period."). In fact, the OCC stated in its amicus brief to this Court that it believes that its regulations may require expiration dates on stored-value cards as a matter of sound banking practice. *See* OCC Bulletin No. 96-48 at *8 ("Effective controls, audit coverage, and other preventive measures should be in place to deter or minimize the impact of fraud, counterfeiting, and

other improper activities."). We must defer to these regulations because they are not "unreasonable, unauthorized, or inconsistent." *Ridgway v. Ridgway,* 454 U.S. 46, 57, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981) (cited favorably in *Fid. Fed. Sav. & Loan Ass'n,* 458 U.S. at 153, 102 S.Ct. 3014); *see also Chevron U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). Thus, we conclude that the National Bank Act gives a national bank the authority to issue and sell stored value giftcards such as the ones at issue in this case.

Having determined that it is within a national bank's powers to issue and sell the giftcards at issue here, we must determine whether the National Bank Act gives national banks the power to engage third party agents to market and sell the giftcards. The National Bank Act explicitly states that a national bank may use "duly authorized officers or agents" to exercise its incidental powers. 12 U.S.C. § 24, Seventh. The OCC adds that it has explicitly allowed banks to use agents to carry out bank activities. *See, e.g.,* Preemption Determination (Michigan Motor Vehicles Sales Act), 66 Fed.Reg. 28,593 (May 23, 2001) (allowing agents to market automobile loans); 12 C.F.R. § 7.1014 (allowing agents to sell bank-issued money orders). At least one other circuit has

suggested that national banks may use agents to perform activities authorized by the National Bank Act. *See Cades v. H & R Block,* 43 F.3d 869, 873-74 (4th Cir.1994) (finding that 12 U.S.C. § 85 requires that a national bank's home state usury laws apply, when the bank had used out-of-state agents to engage in "face-to-face solicitation of . . . consumers"). Accordingly, we agree with USB and Simon that the National Bank Act authorizes national banks to engage agents to carry out some of their activities.

Because the National Bank Act confers on national banks the power to issue stored value gift cards like those at issue here and to market and sell them through third party agents, we consider whether the New Hampshire CPA frustrates the exercise of that power. The New Hampshire CPA prohibits the sale of a giftcard with a value of less than $100 that carries an expiration date or administrative fees. Ayotte argues that this regulation does not conflict with the National Bank Act or OCC regulations because it regulates only Simon, a company that is not a bank. Ayotte notes that no enforcement action was brought against USB. But this analysis is too formalistic: the question here is not *whom* the New Hampshire statute regulates, but rather, against *what activity* it regulates. *See Watters v. Wachovia Bank, N.A.,* 550 U.S. ___, 127 S.Ct. 1559, 1570, 167 L.Ed.2d 389 (2007) ("We have never held that the preemptive reach of the [National Bank Act] extends only to a national bank itself. Rather, in analyzing whether state law hampers the federally permitted activities

of a national bank, we have focused on the exercise of a national bank's *powers*. . . . " (emphasis in original)). For example, in *Franklin National Bank,* the Supreme Court decided that the National Bank Act preempted local regulations that prohibited banks from advertising that they accepted "savings." 347 U.S. at 378, 74 S.Ct. 550. The Court stated that because national banks were given the power to "accept and pay interest on time deposits of people's savings . . . they must be deemed to have the right to advertise that fact." *Id.* It is true that the state regulation at issue in *Franklin National Bank* applied only to national banks themselves. However, we do not believe that the regulation at issue in *Franklin National Bank* would have presented any less of a conflict with the National Bank Act if it indirectly restricted a national bank's power by prohibiting New York advertising firms from using the word "savings" when preparing advertising for a bank, or if it had prohibited billboard owners from posting signs for banks that included the word "savings." The point of *Franklin National Bank* was that the New York regulation impeded the ability of a national bank to carry out one of its statutorily granted powers, the power to accept deposits.

The New Hampshire CPA is no different. New Hampshire's CPA regulates the terms and conditions of the giftcards issued by USB, *i.e.,* expiration dates and administrative fees. These terms govern the relationship between the purchaser of the giftcard and USB. Simon plays no role in defining this

relationship and has no role in managing it; USB has sole control over these terms and conditions and is solely responsible for compliance with them. Thus, the New Hampshire CPA is not concerned with Simon's activity, which is limited to how and where the giftcards are marketed,[5] but rather with the sale of certain giftcards through a third party agent, which is the activity of USB, a national bank. Even if the CPA does not directly prohibit USB from engaging in such activity, it does so indirectly by prohibiting Simon from acting as USB's agent. It would be contrary to the language and intent of the National Bank Act to allow states to avoid preemption of their statutes simply by enacting laws that prohibited non-bank firms from providing national banks with the resources to carry out their banking activities. As such, the New Hampshire CPA regulates the activities of a national bank.

Ayotte also contends that neither the National Bank Act nor OCC regulations specifically require giftcards to have expiration dates or administrative fees, and as such, are not in conflict with the New Hampshire CPA. The Supreme Court has directly answered this argument by holding that conflict preemption is implicated in situations beyond those where a federal law requires something that a state law prohibits. *See Barnett Bank,* 517 U.S. at 35, 116

---

[5] We express no opinion as to whether state regulation of these aspects of a giftcard program might be preempted by the National Bank Act.

S.Ct. 1103. Instead, the Court says, the preemptive scope of the National Bank Act is broader because it says that national banks "may" engage in certain activities and "the word 'may' . . . does not condition federal permission upon that of the State." *Id.*; *see also Wachovia Bank, N.A. v. Burke,* 414 F.3d 305, 314 (2d Cir.2005) ("[S]tate regulation is preempted if it will 'significantly interfere with the national bank's exercise of its powers.'" (quoting *Barnett Bank,* 517 U.S. at 33, 116 S.Ct. 1103)). We have held that the National Bank Act gives USB the power to issue the giftcards at issue in this case and sell them through a third party agent such as Simon. New Hampshire's CPA prohibits Simon from selling the USB-issued giftcards. Because the New Hampshire CPA "significantly interferes" with USB's statutory power, it is preempted by the National Bank Act.

Ayotte cites three district court cases in favor of the Attorney General's argument that the CPA is not preempted: *Colorado ex rel. Salazar v. ACE Cash Express, Inc.,* 188 F.Supp.2d 1282 (D.Colo.2002), *Carson v. H & R Block, Inc.,* 250 F.Supp.2d 669 (S.D.Miss.2003), and *SPGGC, Inc. v. Blumenthal,* 408 F.Supp.2d 87 (D.Conn.2006). Ayotte's reliance on these cases is misplaced. In *Salazar,* the only question presented was whether the defendant non-bank could remove a state enforcement action based on usury laws from state court to federal court on the basis of the complete preemption doctrine; the district court held that it could not. 188 F.Supp.2d at 1283-84. But as we noted earlier, the doctrine of complete

preemption determines whether a federal court has jurisdiction over a claim, not whether a state enforcement action would be precluded on the merits by federal preemption. *supra* note 4. *Salazar* did not resolve the question of whether a state regulation that prohibited a bank's third party agent from carrying out bank activities would be preempted by the National Bank Act, and as such, we do not find it persuasive here.

Carson is even less persuasive. In *Carson,* as in *Salazar,* the district court granted a motion to remand based on the lack of federal jurisdiction because it rejected the defendant non-bank's complete preemption argument. 250 F.Supp.2d at 673-75. However, unlike *Salazar,* the statute at issue in *Carson* did not prohibit a banking activity, but rather prohibited the third party agent from misrepresenting the bank products it was selling. *Id.* at 673. This type of statute, which regulates the actions of the third party agent rather than a bank product, is unlike the New Hampshire CPA, which seeks to prohibit the sale of the bank product itself. Thus, *Carson* is inapposite here.

Finally, *SPGGC* is also factually distinguishable. In *SPGGC,* Connecticut regulators were attempting to regulate the sale of BoA-issued giftcards by Simon. 408 F.Supp.2d at 94-95. As we have already noted, Simon's arrangement with BoA differed from Simon's present relationship with USB because in the arrangement with BoA, Simon set and collected all of the fees from the sale of the giftcards and managed

the giftcard program. BoA's role in the arrangement was limited to issuing the card and collecting a transaction fee that would be paid to it when the card was used. *See id.* at 94. We do not decide today whether BoA's involvement in that arrangement would be sufficient to implicate the National Bank Act; it is sufficient to say that here, where Simon's role is limited to acting as USB's agent in marketing and selling the giftcards, the facts of the case support a finding of preemption.[6] Accordingly, we find that the National Bank Act and the regulations promulgated thereunder by the OCC preempt the enforcement of New Hampshire's CPA so as to prohibit Simon from selling national bank-issued giftcards that carry expiration dates and administrative fees.

B. The HOLA

The HOLA directs the OTS to "provide for the organization, incorporation, examination, operation, and regulation of . . . Federal savings associations."

---

[6] We also reject Ayotte's assertion that the OCC has specifically stated that the New Hampshire CPA should apply to Simon's activities. Ayotte cites a letter from the OCC to Thomas F. Reilly, the then – Attorney General of Massachusetts, which states that the OCC "do[es] not believe the state restrictions on Simon's fees would be preempted. . . . " However, this letter was giving the OCC's opinion as to whether a Massachusetts regulation would apply to the gift card program that previously existed between Simon and BoA, which is factually distinct from the program at hand here. The OCC's letter has no relevance to the present litigation.

12 U.S.C. § 1464(a). The Supreme Court has stated that "[i]t would have been difficult for Congress to give the [OTS] a broader mandate." *de la Cuesta,* 458 U.S. at 161, 102 S.Ct. 3014 (first alteration in original) (quoting *Glendale Fed. Sav. & Loan Ass'n v. Fox,* 459 F.Supp. 903, 910 (C.D.Cal.1978)). OTS regulations explicitly state that they are "preemptive of any state law purporting to address the subject of the operations of a Federal savings association." 12 C.F.R. § 545.2; *see also Bank of Am. v. City & County of S.F.,* 309 F.3d 551, 558 (9th Cir.2002) ("[S]ince the passage of the HOLA in 1933, OTS regulations have governed the 'powers and operations of every federal savings and loan association from its cradle to its corporate grave.'"). As with the National Bank Act, we must determine if OTS regulations allow a national thrift to issue giftcards with expiration dates and administrative fees, if a national thrift may engage third party agents to market and sell those giftcards, and if the New Hampshire CPA conflicts with those regulations.

The HOLA allows a national thrift to accept deposits and to issue evidence of those deposits. 12 U.S.C. § 1464(b)(1)(A); *see also*12 C.F.R. § 557.10. The OTS has promulgated regulations that allow national thrifts to transfer those deposits to a third party at the customer's direction. 12 C.F.R. § 545.17. The OTS permits national thrifts to use "electronic means or facilities to perform any function" of a national thrift. 12 C.F.R. § 555.200(a). The OTS has interpreted these regulations to allow national thrifts to issue stored

value giftcards. *See* Office of Thrift Supervision, *Gift Card Programs* (Feb. 28, 2007), *available at* http://www.ots.treas.gov/docs/2/25254.pdf.[7] The OTS's guidance on giftcards explicitly provides that the giftcard terms and conditions should state the expiration date and the amount of any "service" or "maintenance fees." *Id.* at 2. As with the National Bank Act, this indicates that the OTS has allowed national thrifts to issue giftcards with such terms. Ayotte has not argued that these regulations are "arbitrary, capricious, or manifestly contrary to the [HOLA]," and absent such a showing, we defer to the OTS's interpretation of the statute. *Chevron,* 467 U.S. at 844, 104 S.Ct. 2778. Thus, we conclude that OTS regulations permit national thrifts to issue stored value giftcards with expiration dates and administrative fees, such as the ones issued by Metabank.

The HOLA and OTS regulations also allow national thrifts to engage third party agents to assist in the exercise of national thrift powers. First, the HOLA itself envisions the use of third party agents; it

---

[7] When a consumer purchases a giftcard from a thrift, she provides a "deposit" to the thrift from which she can draw pursuant to the giftcard terms and conditions. In exchange, the thrift issues the consumer a giftcard, which is "evidence" of the deposit. When a consumer uses the giftcard to make a purchase, the thrift then "transfers" the money from the giftcard account to the seller via a provider network such as VISA. Thus, it is not unreasonable for the OTS to view the issuance of giftcards as an innovative exercise of a national thrift's deposit and transfer powers.

requires that a national thrift provide the OTS with "prompt and complete access" to its agents for regulatory purposes. 12 U.S.C. § 1464(d)(1)(B)(ii). In addition, the OTS has issued an opinion that states that national thrifts may use third parties to market and sell their financial products:

> Federal savings associations have the ability to decide how they market and solicit their banking products and services, subject to [the] OTS's regulatory oversight. This principle is not abrogated, nor should state license and registration requirements become applicable, merely because an association contracts with a third party to perform marketing, solicitation, and customer service activities.

Office of Thrift Supervision Opinion Letter No. P-2004-7, Authority of a Federal Savings Association to Perform Banking Activities through Agents Without Regard to State Licensing Agreements 10 (Oct. 25, 2004) (footnote omitted), *available at* http://www.ots.treas.gov/docs/5/560404.pdf. Moreover, OTS guidance on giftcards specifically mentions this power: "Use of third parties [to administer gift card programs] is appropriate provided thrifts follow OTS guidance on such arrangements." *Gift Card Programs, supra,* at 4 n. 11. Thus, we conclude that the HOLA and OTS regulations allow a national thrift to engage third parties to market and sell stored value giftcards. *Cf. State Farm Bank, F.S.B. v. Burke,* 445 F.Supp.2d 207, 218-220 (D.Conn.2006) (finding that a national thrift's agents were subject to regulation by the OTS, rather than a state, where the OTS had

allowed the thrift to engage in selling certificates of deposit).

As with the National Bank Act and OCC regulations regarding the sale and marketing of stored value giftcards by third parties, the HOLA and OTS regulations permit Metabank to use third party agents such as Simon to sell stored value giftcards over $100 with expiration dates and administrative fees, whereas the New Hampshire CPA prohibits third party agents from selling the Metabank-issued cards. Thus, the New Hampshire CPA indirectly prohibits a national thrift from exercising powers granted to it under the HOLA and OTS regulations. Therefore, the enforcement of the New Hampshire CPA against Simon for selling Metabank-issued giftcards would frustrate the purpose of the HOLA and the OTS regulations enacted thereunder in allowing national thrifts to sell stored value giftcards through third party agents, and as such, we find an "irreconcilable conflict" between them. *See Barnett Bank,* 517 U.S. at 31, 116 S.Ct. 1103. Thus, we conclude that the HOLA and OTS regulations preempt the New Hampshire CPA as it is applied to Simon's sale of the giftcards at issue here.

III. *Conclusion*

Our holding should not be interpreted as opining on the adequacy of OCC or OTS regulation of giftcard sales by third party agents; we urge those bodies to ensure that these activities are adequately regulated.

Nor does our ruling preclude a state from enacting laws that regulate activities of national banks or national thrifts, so long as those laws do not conflict with the powers granted to national banks or national thrifts by the National Bank Act and the HOLA. *Watters,* 127 S.Ct. at 1567. Nevertheless, for the foregoing reasons, we find that the OCC and OTS are entitled to regulate the terms and conditions of giftcards sold by national banks and national thrifts and that their regulations preempt the New Hampshire CPA inasmuch as it prohibits Simon from selling national bank- and national thrift-issued giftcards with expiration dates and administrative fees. Thus, we affirm the judgment of the district court.

Affirmed.

United States District Court, D. New Hampshire.
SPGGC, LLC; MetaBank; and U.S. Bank, N.A., Plaintiffs
v.
Kelly A. AYOTTE, Attorney General, Defendant.
Civil No. 04-cv-420-SM.
Opinion No. 2006 DNH 089.

Aug. 1, 2006.

David E. Melaugh, James R. McGuire, Morrison & Foerster LLP, San Francisco, CA, Margaret M. Pinkham, Paul W. Shaw, Brown Rudnick Berlack Israels, Boston, MA, Marc R. Scheer, Wadleigh Starr & Peters, Bruce W. Felmly, McLane Graf Raulerson & Middleton, Manchester, NH, for Plaintiffs.

Richard W. Head, NH Attorney General (Consumer Protection), David A. Rienzo, NH Attorney General's Office (DOJ), Concord, NH, for Defendant.

ORDER

MCAULIFFE, Chief Judge.

This case arises from the sale of prepaid gift cards by SPGGC, LLC, in New Hampshire – cards the State says fail to meet regulatory requirements and limitations imposed on "gift certificates" under New Hampshire law. When the Attorney General threatened enforcement action, SPGGC brought this suit seeking declaratory and injunctive relief. In count one of its third amended complaint, it seeks a declaration that relevant provisions of New Hampshire's Consumer Protection Act ("CPA") are preempted by

the National Bank Act and/or the Home Owners' Loan Act and, therefore, do not apply to it as a seller of prepaid gift cards issued by a national bank or a federal savings association. In count two, SPGGC seeks a declaration that various provisions of that state statute, if enforced against it, would violate the Commerce Clause of the United States Constitution.

U.S. Bank is a national bank, organized under the National Bank Act, 12 U.S.C. § 21, et seq. (the "NBA"). MetaBank is a federal savings association, organized under the Home Owners' Loan Act, 12 U.S.C. § 1461, et seq. ("HOLA"). They are the banking entities that actually own and issue the prepaid Simon Giftcards. After SPGGC initiated this declaratory judgment action, the banks sought and were granted leave to intervene as plaintiffs.

SPGGC, supported by both U.S. Bank and MetaBank, moves for summary judgment as to both counts in its third amended complaint. Defendant objects. For the reasons set forth below, SPGGC's motion is granted in part, and denied in part.

Standard of Review

When ruling on a party's motion for summary judgment, the court must "view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." *Griggs-Ryan v. Smith,* 904 F.2d 112, 115 (1st Cir.1990). Summary judgment is appropriate when the record reveals "no genuine issue as to

any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In this context, "a fact is 'material' if it potentially affects the outcome of the suit and a dispute over it is 'genuine' if the parties' positions on the issue are supported by conflicting evidence." *Intern'l Ass'n of Machinists and Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 199-200 (1st Cir.1996) (citations omitted).

Factual Background

I. *General.*

SPGGC, LLC ("Simon") is an affiliate of Simon Property Group, L.P., which owns and operates shopping malls across the United States, including three in the State of New Hampshire. Simon is not a bank, a bank subsidiary, or a bank affiliate. In August of 2001, Simon began selling the Simon Visa Giftcard (the "Giftcard"). It has been available in Simon malls in New Hampshire since 2003. According to Simon, it is currently selling the Giftcard in 35 states, as well as over the Internet.

The Giftcard is a prepaid electronic stored value card. It looks like a credit card or bank debit card, consisting of an embossed plastic card with a magnetic information strip on the back, which operates on the Visa debit infrastructure. The card is accepted worldwide, wherever Visa debit cards are accepted (both online and in person), including locations that are not affiliated with Simon malls. According to

MetaBank, that involves more than 30 million merchants in over 150 countries.

The purchaser of a Giftcard specifies the amount, or value, that he or she wishes to place on the Giftcard and a balance in that denomination (less an initial "handling fee") is established on the card. Unlike a traditional gift certificate, however, the Giftcard can be replaced if lost or stolen, and its owner is not responsible for unauthorized uses of the card. But, according to plaintiffs, in order to comply with Visa fraud prevention and card maintenance requirements, all Giftcards, including those sold in New Hampshire, must bear an expiration date.

Also unlike a traditional gift certificate, several fees and charges are associated with the Giftcard, which plaintiffs say are levied in order to recover administrative costs associated with maintaining the Giftcard program. The State asserts that those other fees, to the extent they diminish the total amount for which the Giftcard may be redeemed, as well as the fact that the Giftcards have an expiration date, violate specific provisions of New Hampshire's Consumer Protection Act applicable to gift certificates.

II. *Simon's Various Giftcard Programs.*

From the program's inception in 2001, through August of 2005, Simon Giftcards were issued through Bank of America ("BoA"). Under Simon's agreement with BoA, all Giftcards and cardholder agreements were required to identify BoA as the issuer of the

Giftcard. According to Simon, BoA was responsible for the design of the cards and could make changes to them and the cardholder agreements at any time (though it appears that BoA generally deferred to Simon on that issue). And, says Simon, it acted simply as BoA's agent for the purpose of marketing, selling, and servicing the Giftcards. Unlike the current Giftcard programs, all funds generated by the sale of the Giftcards and all fees and charges associated with the Giftcard program were remitted to Simon. For its part, BoA was compensated in the form of a "transaction fee" for each Giftcard transaction that generated interchange fees from VISA.[1]

In July of 2005, Simon entered into agreements with both U.S. Bank (a national bank) and MetaBank (a federal savings association) for the purpose of promoting and selling the Simon Visa-branded Giftcards. Although the individual agreements are distinct, they generally describe similar programs, under which the bank owns and issues the Giftcards, defines the relationship between the bank and the consumer (i.e.,

---

[1] According to Simon, "Giftcard transactions are modeled on credit card transactions, in which the merchant who accepts a credit card as payment actually receives only about 98% of the charged price of the item. The remaining 2% is called the 'merchant discount,' which is a fee paid to the merchant's acquiring bank for providing its services. The acquiring bank splits this fee with the card-issuing bank, which is paid approximately 1.4% of the purchase price. The 1.4% is called the 'interchange fee.'" Simon's memorandum (document no. 36-2) at 10 n. 12.

the purchaser/holder of the Giftcard), and establishes the various fees associated with the cards. Simon is responsible solely for promoting and selling the Giftcards and lacks any authority to alter the terms or conditions of the contractual relationship between the purchaser/holder of the Giftcard and the issuing bank.

It appears that the Simon Giftcards sold over the Internet are issued by Metabank, while those sold at Simon malls are issued by U.S. Bank. Under the terms of the agreement between U.S. Bank and each purchaser/holder of the Giftcard, the following fees and charges apply to the Giftcards: an initial $2.00 "handling fee," a $2.50 monthly "service fee" (which is waived during the first 12 months), a $5.00 "lost or stolen card" fee, and a $15.00 "balance transfer or cash-out fee" upon the Giftcard's expiration. Unlike prior Simon Giftcards, there is no balance inquiry fee, nor is there a "customer service" fee. The new Simon Giftcards expire a minimum of 20 months after purchase. The fee schedule applicable to cards issued by MetaBank is similar ($5.95 handling fee, $2.50 monthly administrative fee beginning 12 months after issuance of the card; $5.00 fee to replace lost or stolen card; and $15.00 fee to replace an expired card). Simon began selling Giftcards pursuant to its agreements with U.S. Bank and Metabank in September, 2005.

When Simon sells a Giftcard to a consumer, it collects payment from the consumer and a corresponding amount (less the initial handling fee) is

loaded onto the card. Simon also provides the consumer with a copy of the Giftcard agreement between the consumer and the issuing bank. The funds collected by Simon are deposited into an account at the bank. U.S. Bank says it accounts for the value loaded onto each Giftcard as a liability running from the bank to the consumer, and it books the fees collected as part of the Giftcard sale as income. At the end of each quarter, U.S. Bank pays a commission to Simon, based on the total amount of Giftcard value sold, which commission U.S. Bank books as an expense. As the consumer redeems the Giftcard, U.S. Bank remits monies to merchants through the Visa settlement network. If any additional fee-generating events occur (e.g., replacement of a lost or stolen card), those fees are imposed by (and retained by) U.S. Bank. Although the record is not entirely clear on this point, the court assumes that MetaBank's accounting practices are substantially similar.

III. *The State Court Litigation.*

The New Hampshire Consumer Protection Act, N.H.Rev.Stat. Ann. ("RSA") ch. 358-A, establishes rules governing the sale of gift certificates within the State of New Hampshire. That statute broadly defines a gift certificate as "a written promise given in exchange for payment to provide the bearer, upon presentation, goods or services in a specified amount." RSA 358-A:1IV-a. Among other things, the Consumer Protection Act provides that gift certificates of $100

or less shall not have expiration dates. RSA 358-A:2XIII. It also prohibits any "[d]ormancy fees, latency fees, or any other administrative fees or service charges that have the effect of reducing the total amount for which the holder may redeem a gift certificate." *Id.*

On November 1, 2004, the State of New Hampshire notified Simon that its sale of Giftcards in this state violates various provisions of the CPA. Accordingly, it informed Simon of its intention to file an enforcement action under that statute to halt the sale of Simon Giftcards in New Hampshire. In anticipation of that enforcement action, on November 12, 2004, Simon filed suit for declaratory and injunctive relief in this court. Three days later, the State filed its own complaint against Simon in the New Hampshire Superior Court (Merrimack County), alleging numerous violations of the CPA.

Simon moved to dismiss the State's complaint in the superior court action, alleging that the CPA does not regulate its Giftcards. In essence, Simon asserted that its Giftcard is not a "gift certificate," as defined by the CPA and, therefore, is not subject to the restrictions imposed by the CPA. The state superior court disagreed, concluding that the Simon Giftcard is a "gift certificate" as contemplated by the CPA and, therefore, is subject to the restrictions and limitations imposed on the sale of gift certificates by that statute. But, aware of the ongoing litigation in this court, the state court stayed all further proceedings before it,

pending this court's resolution of plaintiffs' federal constitutional and preemption challenges.

Discussion

At this juncture, the court need not address whether the various Giftcard programs historically administered by Simon were subject to the provisions of New Hampshire's CPA. Simon's third amended complaint focuses on its current Giftcard programs, which are now administered in association with U.S. Bank and MetaBank. While Simon's past Giftcard programs are, at least in part, the subject of the ongoing state court litigation, this court is not inclined to exercise its discretion to resolve a legal issue central to that litigation but not at issue here.

One important purpose of the Declaratory Judgment Act is to inform the parties of their legal rights and obligations so, *going forward,* they can alter their behavior, act in compliance with applicable law, and prevent further damages from accruing. *See, e.g., Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 534 (1st Cir.1995) ("The Declaratory Judgment Act serves a valuable purpose. It is designed to enable litigants to clarify legal rights and obligations before acting upon them."). Here, of course, there is no threat of additional (allegedly) wrongful conduct on the part of Simon with regard to its prior Giftcard programs. To the extent any of those programs ran afoul of state law, there is little threat that Simon will revive them. Consequently, damages

(if any) flowing from those programs have been fixed and the allegedly wrongful conduct has ceased.

Accordingly, in the exercise of its discretion, the court declines Simon's invitation to rule on its claims relating to prior, now defunct, Giftcard programs. *See generally Ernst & Young*, 45 F.3d at 534 ("Because the Act offers a window of opportunity, not a guarantee of access, the courts, not the litigants, ultimately must determine when declaratory judgments are appropriate and when they are not. Consequently, federal courts retain substantial discretion in deciding whether to grant declaratory relief. As we have stated, the Declaratory Judgment Act neither imposes an unflagging duty upon the courts to decide declaratory judgment actions nor grants an entitlement to litigants to demand declaratory remedies.") (citations and footnote omitted). The state court has concurrent jurisdiction to address those legal issues and it is, of course, fully capable of resolving them. If appropriate, it is equally capable of calculating damages stemming from Simon's past conduct. This court will focus, instead, on the ongoing Giftcard programs and the current legal rights and obligations of Simon, U.S. Bank, and MetaBank.

I. *Background.*

In count one of its third amended complaint, Simon asserts that provisions of New Hampshire's Consumer Protection Act:

> are not applicable to the seller of prepaid electronic stored value gift cards issued by a national bank or federal savings bank, such as the Simon Visa Giftcard, because of federal preemption by the National Bank Act of 1864, 12 U.S.C. § 21 et seq., and regulations issued by the Office of the Comptroller of the Currency, and by the Home Owners' Loan Act, 12 U.S.C. § 1461, et seq., and regulations issued by the Office of Thrift Supervision.

Id. at para. 2. In Simon's view (which is shared by both U.S. Bank and MetaBank), the national banking laws, combined with the broad supervisory authority over national banks and federal savings associations that Congress vested in the Office of Thrift Supervision ("OTS") and the Office of the Comptroller of the Currency ("OCC"), are exclusive and serve to "preempt conflicting state regulation with respect to all banking activities, including those of parties engaged in the business of banking in concert with national banks." Simon's memorandum (document no. 36-2) at 26. And, says Simon, any claims against it relating to the administrative charges and fees imposed by the banks are actionable exclusively under federal law, which law preempts related state law claims.

For its part, the State does not assert that either U.S. Bank or MetaBank lacks authority to issue the Giftcards. Nor does it seriously contend that the provisions of the New Hampshire CPA would (or even could) control the terms and conditions of the Giftcards if they were sold directly to consumers by U.S.

Bank and/or MetaBank – in fact, it appears that both banks currently sell stored value cards through the Internet (available for purchase in New Hampshire), which are substantially similar to the Simon Visa Giftcard. The State has not challenged those products as violating the New Hampshire CPA. Nevertheless, because the Giftcards are promoted and sold by Simon, as agent for the banks, the State asserts that the CPA is not preempted by federal banking laws and may properly be applied to the Giftcards sold by Simon. The State does not question the Banks' authority to contract with non-bank third parties to distribute bank products. It merely asserts that federal preemption does not extend to those non-bank third parties who therefore must abide by state law.

Defendant's supplemental memorandum (document no. 84) at 4. In other words, because the Giftcard is sold by Simon – a non-bank entity – the State asserts that federal banking laws do not preempt the limitations the CPA would otherwise impose on the fee structure of the Giftcard. The State's action to enforce the Consumer Protection Act remains against Simon, and only against Simon. Entry by the Banks [as intervenors] into this case does nothing to rectify the remoteness of the relationship between a consumer and the Banks. Simon is still not a national bank, thus the Simon Giftcard is still not a bank product. *Id.* at 6. The court disagrees.

II. *Preemption.*

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). Federal law can preempt state law in three ways. First, Congress can explicitly declare that state regulation in a particular area is preempted by federal law. *See, e.g., Beneficial Nat'l Bank v. Anderson,* 539 U.S. 1, 6-7, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003). Second, federal preemption may be inferred when congressional regulation of a particular field is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). Finally, state regulations are preempted when those regulations actually conflict with federal regulations or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). *See also Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

In interpreting national bank legislation, the Supreme Court has consistently construed "grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law." *Barnett Bank v. Nelson,* 517 U.S. 25, 32, 116 S.Ct.

1103, 134 L.Ed.2d 237 (1996). "In defining the pre-emptive scope of statutes and regulations granting a power to national banks, [our cases] take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33, 116 S.Ct. 1103.

Here, federal regulations authorize both U.S. Bank and MetaBank to issue stored value cards, such as the Simon Visa Giftcard. *See, e.g.,* 12 C.F.R. § 7.5002(a)(3) (authorizing national banks to offer "electronic stored value systems"); 12 C.F.R. § 555.200(a) (authorizing federal savings associations to use "electronic means or facilities to perform any function, or provide any product or service as part of an authorized activity"). *See also* Exhibit 1 to MetaBank's motion to supplement (document no. 87-2), OTS Opinion Letter P-2006-3 (June 9, 2006) at 3 (discussing the multiple sources of authority for federal savings associations to issue stored value cards). Implicit in that grant of authority to issue stored value cards is the "incidental" power to establish the conditions under which those cards are issued and employed (including fee schedules and expiration dates) – subject, of course, to applicable federal (rather than state) consumer protection laws. *See generally,* OCC 98-31, *Guidance of Electronic Financial Services and Consumer Compliance,* 1998 WL 460874 (July 30, 1998).

Consequently, state statutory or regulatory provisions which purport to limit fees that may be

charged to the holder of a stored value card, or otherwise impose restrictions on the contractual relationship between the cardholder and the issuing national bank or federal savings association are preempted. *See generally Bank of America v. City & County of San Francisco,* 309 F.3d 551 (9th Cir.2002) (discussing the preemptive effect of HOLA and OTS regulations); *Wells Fargo Bank of Texas v. James,* 321 F.3d 488 (5th Cir.2003) (discussing the preemptive effect of the NBA and OCC regulations). *See also* Exhibit 1 to MetaBank's motion to supplement (document no. 87-2), OTS Opinion Letter P2006-3 (June 9, 2006) (discussing federal preemption of state gift card restrictions); 12 C.F.R. § 7.5002(c) (noting that "State laws that stand as an obstacle to the ability of national banks to exercise uniformly their Federally authorized powers through electronic means or facilities, are not applicable to national banks"). As the District Court for the District of Connecticut recently observed:

> Because the OCC explicitly authorizes national banks to charge [their] customers fees, any state law that impairs a national bank from exercising its federally authorized power to charge fees could arguably be preempted by the NBA. The rationale underlying that conclusion is that Congress has clearly expressed its intent for national banks to be regulated by federal authority. Complying with both laws could cause an irreconcilable conflict, because the OCC has ruled that, when it explicitly authorizes a national bank

> to exercise a power, a state may not infringe that authorization.

SPGGC, Inc. v. Blumenthal, 408 F.Supp.2d 87, 93-94 (D.Conn.2006) (citation omitted).

The question remains, however, whether the State may enforce provisions of the CPA against Simon (rather than either of the issuing banks), or whether Simon, as issuing agent of those banks, is also protected from local regulation by principles of federal preemption. In essence, while the State implicitly concedes that the banks are authorized to sell the Giftcards in New Hampshire (free from regulation under the State's CPA), it claims they cannot use Simon as their agent to conduct such sales. *See generally* Transcript of February 28, 2006 hearing (document no. 80). The State asserts that, by employing Simon as a sales agent, the issuing banks have removed themselves too far from the consumer/purchaser for principles of preemption to apply. *Id.* In other words, while the State concedes that it cannot directly prevent U.S. Bank or MetaBank from issuing stored value cards in New Hampshire that bear user fees and expiration dates, it believes it can achieve that goal indirectly by preventing Simon from marketing and selling those cards on behalf of the banks. It cannot.

III. *Use of Third Parties.*

The central issue presented in this case is whether the involvement of Simon as promoter/seller

of the Giftcards exposes those cards to state regulations which would otherwise be preempted by federal banking laws. Or, viewed from a slightly different perspective, the question is whether Simon's involvement in the Giftcard program is so substantial and its relationship with Giftcard consumers so close that it renders the banks' involvement too remote to properly consider the Giftcard a national bank product.

Merely because the Giftcard is sold by Simon does not compel the conclusion that it is not a bank product. First, both national banks and federal savings associations are specifically authorized to use third parties to carry on the business of banking. *See, e.g.,* 12 U.S.C. § 24 Seventh (authorizing national banks to use agents to conduct banking business); Exhibit C to MetaBank's supplemental memorandum (document no. 83), Office of Thrift supervision, Thrift Bulletin 82a (September, 2004) (discussing savings association's use of third parties to provide assistance in providing banking services). *See generally Franklin Nat'l Bank v. New York,* 347 U.S. 373, 74 S.Ct. 550, 98 L.Ed. 767 (1954). And, as U.S. Bank points out, national banks routinely establish relationships with non-banking entities in order to market and/or distribute the national bank's products. Examples include: (1) issuance of private label credit cards (e.g., department store credit cards); (2) issuance of co-branded credit cards; (3) use of mortgage brokers to solicit real estate loans; (4) use of automobile dealers to solicit loans to finance motor vehicles; and (5) the

use of third parties to solicit tax refund anticipation loans. *See, e.g., Cades v. H & R Block, Inc.*, 43 F.3d 869 (4th Cir.1994).

In none of those circumstances does the mere involvement of a third party render the product being sold something other than a national bank product. Nor does the involvement of the third party automatically subject the product to state regulation. The cases involving payday lenders and tax refund anticipation loans cited by the State do not undermine this legal principle. *See* Defendant's memorandum (document no. 41-2) at 4-5. Rather, those cases deal primarily with removal jurisdiction and complete preemption and/or fraudulent or deceptive conduct by the agent of the bank – issues not present in this case.

The State's reliance on the court's preemption analysis in *Blumenthal, supra,* is also misplaced. In that case, the challenged monthly maintenance fees were charged by and retained by **SPGGC**, not the issuing bank. As the court noted, the issuing bank "does not profit from the monthly maintenance fees. Rather [the bank] earns its profit on the card by way of the interchange fees from Visa on a per-transaction basis." 408 F.Supp.2d at 94. Thus, it was **SPGGC** (a non-banking entity) that was charging and profiting from fees imposed on holders of stored value cards that arguably violated state law. That is a critical factual difference from the case at hand, in which the issuing banks levy the various fees (which are disclosed to the customer and form part of his or her

contract with the issuing bank) and establish the expiration dates for the Giftcards.

Moreover, as distinct from the facts pled in *Blumenthal,* Simon's role as sales and marketing agent for both U.S. Bank and MetaBank is quite circumscribed. Its involvement in the U.S. Bank Giftcard program is limited to: marketing of the program; maintenance of an inventory of Giftcards; the sale and initial collection of funds from the consumer; activation and loading of the Giftcard; the physical transfer of the Giftcard to the consumer, along with a copy of the agreement between the consumer and U.S. Bank; and the remission of collected funds to the bank. Unlike earlier Giftcard programs, Simon is not compensated through the collection of fees imposed on Giftcard holders – those sums are retained by the issuing banks. Instead, consistent with its role as sales agent, Simon is compensated through a sales-based commission.

Moreover, Simon has no authority to alter the terms of the Giftcards, the associated fee schedule, the substantive terms of the disclosures provided to the purchaser, or the terms and conditions of the contractual relationship that arises between the consumer and the issuing bank. Those aspects of U.S. Bank's relationship with the consumer are governed by the contract between the bank and the consumer. And, they are subject to federal banking laws and regulations, as well as the regulatory oversight of the OCC.

Simon's involvement in the MetaBank Giftcard program appears to be even more limited than its role in the U.S. Bank program: Simon markets the cards issued by MetaBank at its various malls and through its Web site. Like the U.S. Bank Giftcard program, the relationship between the consumer and MetaBank is governed by the contract between those parties. Simon lacks authority to alter the terms of that contractual relationship. Finally, the contractual relationship between MetaBank and the Giftcard consumer is overseen by federal regulators – in this case, the OTS – and is subject to federal banking laws and regulations.

Plainly, then, the relationship between the issuing bank and the Giftcard consumer is substantial, the terms of which are established by the issuing bank. Simon's involvement in the marketing and sale of those Giftcards on behalf of the issuing banks does not alter or even attenuate that relationship. *See generally Krispin v. May Dep't Stores Co.*, 218 F.3d 919 (8th Cir.2000) (recognizing that, for purposes of determining the legality of late fees charged to customers, the true party in interest was the national bank that issued the credit, processed and serviced customer accounts, and set terms such as interest rates and late fees). Consequently, the terms of the relationship between the Giftcard consumer and either U.S. Bank or MetaBank (including the fee schedule and provisions regarding expiration dates) are governed by federal banking law. State law, to the

extent it purports to regulate the terms or essential aspects of that relationship, is preempted.

The essence of the State's argument in favor of application of the gift certificate provisions of the CPA against Simon is this: "[T]he enforcement of the Consumer Protection Act will not frustrate any purpose of Congress [by hindering the operations of a national bank or federal savings association], as only Simon will be affected, not the Banks." State's reply (document no. 84) at 6. Plainly, that perspective is unrealistic. If the State were able to enforce provisions of its CPA against Simon, one of two consequences would necessarily follow: either the banks would be required to stop all sales in New Hampshire of the Simon Visa stored value Giftcard, or the banks would have to alter the terms and conditions of the contractual relationship between themselves and purchasers of those Giftcards to comply with local law. Given that the Giftcards are banking products issued by federally chartered and federally regulated banks, the State cannot force those banks to elect between those options. Overseeing the terms and conditions of the Simon Giftcard, as well as those of the contractual agreement between purchasers of the Giftcard and the issuing bank, are matters for federal regulators, not the individual states. If there are to be any restrictions on fees associated with the Giftcards, or limitations imposed on expiration dates, they must come either from Congress or the federal agencies empowered by Congress to oversee national banks and federal savings associations.

Conclusion

The Simon Visa Giftcards, as currently marketed, are national banking products. Each Giftcard is owned and issued by either U.S. Bank or MetaBank. The contractual relationship arising out of the purchase of a Simon Visa Giftcard is between the issuing bank and the customer; that bank (not Simon) sets the fee schedule, as well as the terms and conditions governing the use, replacement, and expiration of the Giftcards.

Relevant federal banking regulations authorize both U.S. Bank and MetaBank to issue electronic stored value cards such as the Simon Giftcard. They also authorize those banks to employ the services of third parties, like Simon, to promote and sell their products. Under the circumstances of this case, Simon's role in promoting the Giftcard program and selling the Giftcards does not alter the fact that the Giftcards are federal banking products. Accordingly, the relationship between the issuing bank and the purchaser of a Giftcard – including the terms and conditions governing use of the Giftcard, as well as the associated fee structure – is governed by federal law. To the extent state laws, like New Hampshire's Consumer Protection Act, attempt to impose additional restrictions or limitations on that relationship, they stand as an obstacle to the fulfillment of Congressional policies and goals embodied in federal banking laws and the associated regulations implemented by both OTS and OCC. *See Barnett Bank,* 517 U.S. at 31, 116 S.Ct. 1103.

Stated slightly differently, those aspects of the Simon Giftcard with which the State takes issue – the expiration date and the imposition of fees that have the effect of diminishing the purchased value of the card – are terms that are set by the issuing banks, not Simon. Because those banks are (1) subject to federal banking laws and regulations, and (2) specifically authorized to issue stored value cards such as the Giftcard through third parties, the CPA cannot operate to restrict or otherwise limit those aspects of the Giftcard. This is true notwithstanding the fact that, as the State repeatedly points out, its enforcement action is directed exclusively against Simon, not the issuing banks. In pursuing Simon, the State is indirectly attempting to accomplish that which it cannot do directly: regulate, in New Hampshire, the terms and conditions of stored value cards issued by national banks and federal savings associations.

Moreover, the State's assertion that the terms and conditions of Giftcards sold in New Hampshire *could* be altered to comply with provisions of the CPA is of little moment. The question presented is whether the State can compel the banks to alter those terms to comply with the CPA (or, from the State's perspective, whether it can force Simon to stop selling the Giftcards in New Hampshire unless and until the banks change the terms of their contracts with individual Giftcard purchasers). As noted, the State lacks such authority.

Of course, if this case involved allegations of, say, fraudulent conduct or unfair business practices on the part of Simon, such claims would probably not be preempted. But, no such claims are made here. The sole legal issue is whether the State can, by attempting to enforce provisions of the CPA against Simon, prevent U.S. Bank and MetaBank from imposing various fees on their customers and setting expiration dates on the Giftcards which federal law allows. It cannot.

For the foregoing reasons, as well as those set forth in the memoranda submitted by Simon, MetaBank, and U.S. Bank, the court concludes that the provisions of the New Hampshire CPA which the State seeks to enforce against Simon with respect to the current Giftcard program are preempted by federal banking laws. Simon's motion for summary judgment (document no. 36) is, therefore, granted to the extent it seeks a declaratory judgment to that effect. Having resolved that issue in favor of plaintiffs, the court need not address Simon's assertion that enforcement of the CPA against it is precluded by the Commerce Clause. Accordingly, in all other respects, Simon's motion is denied as moot.

The parties' cross-motions to strike (documents no. 61 and 63) are denied. And, finally, the parties' various motions for leave to file supplemental authority (documents no. 87, 88, 90, and 91) are granted.

The Clerk of Court shall enter judgment in accordance with this order and close the case.

SO ORDERED.

C.A.2 (Conn.), 2007.

United States Court of Appeals,Second Circuit.
SPGGC, LLC, Plaintiff-Appellant,
v.
Richard BLUMENTHAL,
Attorney General, Defendant-Appellee.
Docket No. 05-4711-cv.

Argued: May 10, 2007.
Decided: Oct. 19, 2007.

Margaret M. Pinkham (Paul W. Shaw, on the brief), Brown Rudnick Berlack Israels LLP, Boston, MA, for Plaintiff-Appellant.

Clare E. Kindall, Assistant Attorney General (Richard Blumenthal, Attorney General, Susan Quinn Cobb, Perry Zinn Rowthorn, Jane R. Rosenberg, Assistant Attorneys General, on the brief), Hartford, CT, for Defendant-Appellee.

Julie L. Williams, Office of the Comptroller of the Currency, Washington, D.C., for Amicus Curiae Office of the Comptroller of the Currency.

Before: B.D. PARKER, RAGGI, and WESLEY, Circuit Judges.

B.D. PARKER, JR., Circuit Judge:

Plaintiff-Appellant SPGGC, LLC, a seller of prepaid gift cards, sued to prevent the Connecticut Attorney General from enforcing a state consumer protection law that regulates the terms and conditions of such cards. The United States District Court for the District of Connecticut (Underhill, *J.*) granted

the Attorney General's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). At issue in this appeal is whether SPGGC stated valid claims for declaratory and injunctive relief on the grounds that the Attorney General's enforcement efforts are federally preempted or that they violate the Commerce Clause of the United States Constitution. We affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

Because this appeal is from the dismissal of a complaint under Rule 12(b)(6), we accept all factual allegations in the complaint as true and draw inferences in favor of SPGGC. *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 267 (2d Cir.2006).

A. The Simon Giftcard

SPGGC is a subsidiary of Simon Property Group, Inc., which operates shopping malls in more than thirty states, including Connecticut. The Simon Giftcard, a prepaid, stored-value payment card, is sold in Simon malls, as well as through Simon's website.

At the time SPGGC filed its Second Amended Complaint, the Giftcards were issued by Bank of America, N.A. ("BoA"), a national bank, and operated on the Visa debit card infrastructure. Simon Giftcards – which are similar in size and appearance to credit or debit cards, and carry a Visa logo along with

Simon's name – are accepted by any merchants that accept Visa debit cards. SPGGC acknowledged selling "several thousands of Giftcards each year in Connecticut." All of SPGGC's revenue, and any profit, from the Giftcards derives from the fees associated with them. Several such fees are imposed directly on Giftcard purchasers, including "upfront handling/loading fees, [and] potentially applicable maintenance, replacement, and call center fees."

BoA is a Visa member bank, and as such may issue various forms of Visa payment cards. *See generally United States v. Visa U.S.A., Inc.*, 163 F.Supp.2d 322, 332-33 (S.D.N.Y.2001) ("*Visa I*"), *aff'd*, 344 F.3d 229 (2d Cir.2003) ("*Visa II*"). Issuers generally act as "the liaison between the network [i.e., Visa] and the individual cardholder," and collect an interchange fee each time a transaction is executed. *Visa II*, 344 F.3d at 235. As a Visa member bank, BoA must adhere to Visa's bylaws and operating regulations. *See Visa I*, 163 F.Supp.2d at 332. Pursuant to its relationship with SPGGC, all Simon Giftcards and cardholder agreements identified BoA as the issuer. The cards themselves were identified as property of BoA.

In addition, BoA retained review and approval authority over all terms and conditions for the Giftcards, as well as design of the cards and card carriers with which they were sold. These terms and conditions were uniform across the United States, and, according to SPGGC, were modeled after those used for BoA's own branded gift cards. They included a $2.50 monthly service fee, to be deducted from any

balance remaining on the Giftcard after six months from the date of purchase. In addition, to comply with Visa regulations, all Simon Giftcards carried a one-year expiration date. According to SPGGC's complaint, BoA approved these terms.

B. The Connecticut Giftcard Law

The Connecticut Gift Card Law prohibits the sale of any "gift certificate" subject to inactivity or dormancy fees or to an expiration date. *See* 2003 Conn. Pub. Acts 03-1 §§ 83, 84 (June 30, 2003 Spec. Sess.) (codified at CONN. GEN.STAT. §§ 3-65c, 42-460 (2007)). Gift certificates are defined to include gift cards and other stored-value cards. CONN. GEN.STAT. § 3-56a(5).

Under the general heading "Escheats," the Gift Card Law provides that "a holder of . . . a gift certificate . . . may not impose on the property a dormancy charge or fee, abandoned property charge or fee, unclaimed property charge or fee, escheat charge or fee, inactivity charge or fee, or any similar charge, fee or penalty for inactivity with respect to the property." *Id.* § 3-65c. Elsewhere, the Law provides that "[n]o person may sell or issue a gift certificate . . . that is subject to an expiration date." *Id.* § 42-460(a).

The Attorney General maintains that the Gift Card Law applies only to the sale of gift cards in Connecticut, not their use, and thus permits cards purchased out of state to be used in Connecticut despite any restrictions or fees such cards may carry.

The intent of the Law, he suggests, is to protect Connecticut consumers from being deprived unwittingly of the value of gift cards they have purchased in the State.

C. Proceedings Below

In November 2004, the Connecticut Attorney General informed SPGGC that the State intended to bring an enforcement action against it for violating the Connecticut Gift Card Law. In response, SPGGC filed an action in federal district court seeking a declaratory judgment that the Attorney General's proposed enforcement action was preempted by the National Bank Act, 12 U.S.C. § 21 *et seq.* Three days later, the Attorney General sued SPGGC in state court, alleging that Simon Giftcards carry expiration dates and impose on consumers a variety of fees in violation of the Gift Card Law. SPGGC removed the Attorney General's action to federal court, where it was consolidated with the original suit. SPGGC amended its complaint to add a claim under the Commerce Clause. SPGGC also sought an injunction preventing the Attorney General from pursuing any further enforcement action against it in state court.

The Attorney General moved to dismiss SPGGC's complaint for failure to state a claim. Judge Underhill granted the motion. SPGGC moved for reconsideration on three bases: (1) that the court had failed to consider our decision in *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir.2005), which was issued a

few weeks prior to the district court's ruling; (2) that the court had clearly erred in its analysis of SPGGC's Commerce Clause claim; and (3) that under an agreement scheduled to take effect in September 2005, the Simon Giftcard would be issued jointly by a national bank and a federal savings association, subjecting it to oversight by the Office of Thrift Supervision ("OTS") as well as the Office of the Comptroller of the Currency ("OCC"). The court granted reconsideration, but adhered to its prior decision dismissing SPGGC's complaint. *See SPGGC, Inc. v. Blumenthal*, 408 F.Supp.2d 87 (D.Conn.2006).

SPGGC appeals, arguing that the district court erroneously dismissed both its preemption and its Commerce Clause claims. SPGGC's arguments focus exclusively on its relationship with BoA – a non-party to this dispute – which has since terminated but was in effect throughout the proceedings in the district court. *Cf. SPGGC, LLC v. Ayotte*, 488 F.3d 525, 529 (1st Cir.2007) (noting that after SPGGC ended its relationship with BoA in September 2005, it entered into contracts with U.S. Bank, a national bank, and Metabank, a national thrift, and describing the terms of those contracts). Accordingly, we will not consider the new contractual arrangements, which SPGGC raised in its motion to reconsider but which were never included in an amended complaint and were not the subject of briefing before this Court. As the Attorney General continues to seek civil penalties from SPGGC relating to its issuance of Simon Giftcards in conjunction with BoA, the issues presented

herein survive the termination of SPPGC's relationship with BoA.

DISCUSSION

We review *de novo* a district court's decision granting a motion to dismiss. *Lattanzio v. Deloitte & Touche LLP,* 476 F.3d 147, 153 (2d Cir.2007).

A. Preemption

Federal preemption of a state statute can be express or implied, and generally occurs: "where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or where federal law conflicts with state law." *Burke*, 414 F.3d at 313. "Federal regulations have no less preemptive effect than federal statutes." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). At issue here is conflict preemption, which "occurs when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *United States v. Locke*, 529 U.S. 89, 109, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000) (internal quotation marks omitted). SPGGC contends that applying the Connecticut Gift Card Law to Simon Giftcards would frustrate the purposes of the National Bank Act ("NBA") and OCC regulations.

The NBA authorizes national banks to exercise several enumerated powers as well as "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh. The Supreme Court has interpreted "grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 32, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). As the agency charged with implementing the NBA and overseeing national banks in the exercise of their powers thereunder, the OCC has broad authority from Congress to prescribe rules and regulations to carry out its responsibilities. 12 U.S.C. § 93a; *see NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 256, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995). This includes the authority to define the "incidental powers" of national banks and to authorize activities beyond those enumerated in the statute. *Id.* at 258 n. 2, 115 S.Ct. 810; *Burke*, 414 F.3d at 312.

One activity the OCC has authorized national banks to engage in is offering "electronic stored value systems." 12 C.F.R. § 7.5002(a)(3). Such systems include payment cards "that enable[ ] individual cardholders to store pre-paid value outside of a conventional consumer demand deposit bank account relationship." O.C.C. Conditional Approval No. 568 (Dec. 31, 2002); *see also* O.C.C. Bull. No. 98-31, Guidance on Electronic Financial Services & Consumer

Compliance FFIEC Guidance (July 30, 1998) ("Electronic stored value products are retail payment products in which value is recorded on a personal electronic device or on a magnetic strip or computer chip in exchange for a predetermined balance of funds."). It is thus beyond genuine dispute that national banks have the authority, under federal law, to develop and market gift cards that function in generally the same way as those at issue here. Moreover, OCC regulations appear to permit, or at least not to prohibit, the attachment of expiration dates and dormancy or inactivity fees to such cards. *See, e.g.*, 12 C.F.R. § 7.4002(a) (authorizing national banks to impose "non-interest charges and fees" on their customers); O.C.C. Bull. No. 96-48, Stored Value Card Systems (Sept. 10, 1996) (noting that stored value systems may have "limits on the amount of electronic cash that can be stored or cards that expire after some established time period").

Without conceding the point, the Attorney General does not dispute that as applied to a national bank, the Connecticut Gift Card Law would be preempted by the OCC's conflicting regulations regarding stored value systems. Assuming that is the case, it follows that the Gift Card Law would also be preempted as applied to national bank operating subsidiaries. 12 C.F.R. § 7.4006 ("Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."); *see Watters v. Wachovia Bank, N.A.*,

___ U.S. ___, 127 S.Ct. 1559, 1570-71, 167 L.Ed.2d 389 (2007).

SPGGC is neither a national bank nor the operating subsidiary of a national bank. However, SPGGC contends that because of its association with BoA, the Simon Giftcard was a national bank product and therefore subject to the OCC's exclusive supervision. The crux of SPGGC's argument is that compliance with the Connecticut Gift Card Law not only restricts its own ability to offer gift cards on terms it deems appropriate, but also limits BoA's ability to issue such cards and have them operate on Visa's electronic payment platform.

SPGGC attempts to analogize its relationship with BoA to the relationship between an operating subsidiary and its parent national bank, over which the OCC has exclusive regulatory jurisdiction. *See Watters*, 127 S.Ct. at 1572; *Burke*, 414 F.3d at 309. The district court rejected this analogy, observing that SPGGC did not plead "any facts to indicate that it is a subsidiary of a national bank, such that the NBA would apply to its activities." 408 F.Supp.2d at 95. "At best," the court found, SPGGC had "a close agency or business relationship with [ ] BoA"; but that is not sufficient to entitle it to protection under the NBA. *Id.* at 94. The court acknowledged that if BoA were a plaintiff, "a different analysis might be required." *Id.* at 95.

In response to a request for amicus briefing by this Court, the OCC argued that the district court

took too narrow a view of the preemption question, particularly in light of the Supreme Court's intervening decision in *Watters v. Wachovia*. *Watters*, like *Burke*, involved a state banking commissioner's effort to enforce regulations pertaining to real estate lending against a national bank operating subsidiary. *See Watters*, 127 S.Ct. at 1565-66. The Supreme Court emphasized that "in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank's *powers*, not on its corporate structure." *Id.* at 1570 (emphasis in original). The OCC contends that the district court's preemption analysis should have focused less on the identity of the plaintiff, SPGGC, than on whether and to what extent the Simon Giftcard represented an exercise of BoA's powers as a national bank.

We agree with this contention as far as it goes. However, we believe that it would be a mistake to read *Watters* so broadly as to obscure the unique role assigned to operating subsidiaries in the context of national banking regulation. The Court in *Watters* observed that unlike other types of national bank affiliates, "an operating subsidiary is tightly tied to its parent by the specification that it may engage *only* in 'the business of banking' as authorized by the Act." *Id.* at 1571-72 (emphasis added) (citations omitted). Moreover, the authority of national banks to do business through operating subsidiaries is itself a power that Congress granted to the banks through the NBA. *See id.* at 1572 ("The authority to engage in

the business of mortgage lending comes from the NBA, as does the authority to conduct business through an operating subsidiary.") (citations omitted). By contrast, the relationship between BoA and SPGGC enjoys no special status under the statute. *Cf.* 12 U.S.C. §§ 24a(g)(3)(A) (distinguishing operating subsidiaries from other financial subsidiaries), 221a(b) (defining national bank "affiliates").

It is possible that, in certain instances, a national bank's decision to carry out its business through an unaffiliated third party such as SPGGC might constitute an exercise of the bank's incidental powers under the NBA, § 24 Seventh. But it does not follow that a state's attempt to regulate the *third party*'s conduct is necessarily preempted as it would be if directed toward the bank itself or toward an operating subsidiary. Significantly, the OCC does not view the regulation of SPGGC's collection of fees as an encroachment on BoA's power, stating specifically in its amicus brief that "we do not believe that the state restrictions on *Simon* charging a monthly service fee in connection with the gift cards would burden or interfere with *national bank* powers to issue stored-value cards as a payment mechanism." (emphasis in the original). In any case, we must ask whether the regulation at issue actually affects the national bank's exercise of any authorized powers or whether it limits only activities of the third party which are otherwise subject to state control.

Although BoA was the issuer of the Simon Giftcard, SPGGC bore the costs of administering the

program and also collected and retained maintenance and other fees associated with the cards. BoA, by contrast, was compensated exclusively through Visa interchange fees generated on a per-transaction basis. While BoA had review and approval authority over any terms and conditions the Giftcards carried, nowhere in its complaint does SPGGC allege that BoA had the authority to establish such terms or conditions in the first instance. That power belonged solely to SPGGC.

We have no difficulty concluding – as the OCC suggests in its amicus brief – that SPGGC has failed to state a valid claim for preemption of the Connecticut Gift Card Law insofar as it prohibits SPGGC from imposing inactivity and certain other fees on consumers of the Simon Giftcard. *See* CONN. GEN.STAT. § 3-65c. The Attorney General's enforcement of the Law, in this respect, does not interfere with BoA's ability to exercise its powers under the NBA and OCC regulations. Rather, it affects only the conduct of SPGGC, which is neither protected under federal law nor subject to the OCC's exclusive oversight. *Cf.* 12 U.S.C. § 481 (granting the OCC authority to examine the affairs of a national bank and its affiliates, "as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank"). We do not address whether we would reach a different conclusion were the fees in question established and collected by the issuing bank rather than by SPGGC. *See, e.g.*, *Ayotte*, 488 F.3d at 533 (holding that New

Hampshire gift card regulations are preempted where U.S. Bank, the national bank that issued the cards, had "sole control" over their terms and conditions and was "solely responsible for compliance" with such terms).[1] That is not the case presently before this Court.

SPGGC, however, does state a valid claim for preemption insofar as the Connecticut Gift Card Law prohibits expiration dates. *See* CONN. GEN.STAT. § 42-460(a). Unlike the various administrative and maintenance fees associated with Simon Giftcards, SPGGC alleged in its complaint that an expiration date is necessary "to implement Visa fraud prevention and card maintenance requirements applicable to all prepaid cards bearing the VISA logo." Taking this allegation as true, an outright prohibition on expiration dates could have prevented a Visa member bank (such as BoA) from acting as the issuer of the Simon Giftcard. BoA is legally entitled to use the Visa payment network, and, contrary to the Attorney General's suggestion, a Visa issuer benefits directly from having the cards operate on the Visa network due to the interchange fees received each time a gift

---

[1] The First Circuit acknowledged the factual distinctions between this case and the New Hampshire case, noting that SPGGC's relationship with BoA differed from its subsequent relationship with U.S. Bank "because in the arrangement with BoA, Simon set and collected all of the fees from the sale of the giftcards and managed the giftcard program." *Ayotte*, 488 F.3d at 534. The OCC draws the same distinction in its amicus brief to this Court.

card transaction is executed. As a result, Connecticut's attempt to prohibit expiration dates must be analyzed separately from the State's ban on inactivity fees for purposes of federal preemption. In the absence of further factual development concerning the precise nature of Visa's requirements, as well as BoA's involvement in setting the expiration date for the Simon Giftcard, we are not at this point prepared to conclude that SPGGC's claim is entirely lacking in merit.[2] Accordingly, we vacate and remand this aspect – but only this aspect – of the judgment below so that the district court can reconsider SPGGC's preemption claim as to the state's ban on expiration dates. We express no view on the resolution of the merits of this claim.

---

[2] The terms and conditions of the Simon Giftcard, attached as an exhibit to the Second Amended Complaint, indicate that cardholders could request that a new card be issued up to one year after the expiration of an older card, and any value remaining on the older card would be transferred to the new card, "minus a $7.50 reissue fee." SPGGC's complaint does not indicate that the reissue fee is part of the Visa fraud prevention and maintenance requirements or that it was required by BoA. To the extent that Connecticut were to treat such a fee as a dormancy or inactivity fee prohibited under § 3-65c-a matter which the Attorney General has not specifically addressed and as to the merits of which we express no opinion – such treatment would not be preempted for all the reasons given above. We do note that the Attorney General has taken the position in its brief that § 3-65c does not prohibit charges "such as fees to purchase and load the card, which are obvious to the consumer" and "also does not preclude the issuer from charging a fee for replacing a lost card."

B. Commerce Clause

SPGGC claims that, as applied to the Simon Giftcard, the Connecticut Gift Card Law also violates the Commerce Clause of the United States Constitution. The Commerce Clause authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. In addition, courts have "long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, ___ U.S. ___, 127 S.Ct. 1786, 1792, 167 L.Ed.2d 655 (2007). State laws that clearly discriminate against interstate commerce in favor of intrastate commerce are considered "virtually *per se* invalid." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). Discrimination, in this context, "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.*

By contrast, we will uphold a nondiscriminatory statute that affects interstate commerce only incidentally, "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). To prove that a state law is either *per se* invalid or fails the *Pike* balancing test, a plaintiff must at least show that the law has a "disparate impact" on interstate commerce. *Automated Salvage Transp., Inc. v. Wheelabrator*

Envtl. Sys., Inc., 155 F.3d 59, 75 (2d Cir.1998); *see also Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 218 (2d Cir.2004).

SPGGC identifies two ways in which the Connecticut Gift Card Law allegedly impacts interstate commerce: (1) it effectively regulates commerce occurring outside of Connecticut; and (2) it conflicts with the gift card regulations of other states. Because SPGGC has failed to plead facts sufficient to support either theory, the district court properly dismissed its dormant Commerce Clause claims.

1. *Extraterritoriality*

A state law may burden interstate commerce when it "has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction." *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102 (2d Cir.2003) (internal quotation marks omitted); *see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir.2001). When a statute "directly controls commerce occurring wholly outside the boundaries of a State," it is invalid under the Commerce Clause because it "exceeds the inherent limits of the enacting State's authority." *Healy v. Beer Inst.*, 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989). We have analyzed the extraterritorial effects of state regulations as a form of excessive burden under the *Pike* balancing test, *see, e.g.*, *Sorrell*, 272 F.3d at 109-10, and also as a basis for per se invalidity, *see, e.g.*, *Wheelabrator*, 155 F.3d at 77-78;

see also Freedom Holdings, 357 F.3d at 216 n. 11. Although it is not entirely clear from our dormant Commerce Clause precedents which test should apply in this case, it is irrelevant because – on the facts alleged by SPGGC – the Connecticut Gift Card Law does not regulate out-of-state commerce. *Cf. Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 439, 125 S.Ct. 2419, 162 L.Ed.2d 407 (2005) (Scalia, J., concurring); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986) (recognizing "that there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach").

SPGGC attempts to analogize the Connecticut Gift Card Law to regulations the Supreme Court held unconstitutional in *Healy v. Beer Institute* and *Brown-Forman Distillers v. New York State Liquor Authority*. *Healy* and *Brown-Forman* both concerned state laws that pegged the instate prices of liquor or beer to prices charged outside the states in question. *See Healy*, 491 U.S. at 326-27, 109 S.Ct. 2491 (describing Connecticut's beer price-affirmation statute); *Brown-Forman*, 476 U.S. at 575-76, 106 S.Ct. 2080 (describing New York's Alcoholic Beverage Control Law). Although the statutes at issue in those two cases differed somewhat in operation, each had "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Healy*, 491 U.S. at 337, 109 S.Ct. 2491. In *Brown-Forman*, the

Court found that New York had "project[ed] its legislation into other States" by effectively requiring distillers to seek the approval of the New York State Liquor Authority before lowering prices elsewhere. 476 U.S. at 583-84, 106 S.Ct. 2080 (internal quotation marks omitted). Likewise, in *Healy*, the Court observed that Connecticut had "require[d] out-of-state shippers to forgo the implementation of competitive-pricing schemes in out-of-state markets because those pricing decisions are imported by statute into the Connecticut market regardless of local competitive conditions." 491 U.S. at 339, 109 S.Ct. 2491. Holding both statutes unconstitutional, the Court noted that "States may not deprive businesses and consumers in other States of 'whatever competitive advantages they may possess' based on the conditions of the local market." *Id.* (quoting *Brown-Forman*, 476 U.S. at 580, 106 S.Ct. 2080). SPGGC suggests that the Gift Card Law, like the liquor and beer price regulations, benefits Connecticut consumers at the expense of consumers in other states.

None of the factual allegations in SPGGC's complaint supports its bald assertion that the Gift Card Law operates as a form of economic protectionism in favor of Connecticut consumers.[3] *Cf. Brown-Forman*,

---

[3] In its complaint, SPGGC also asserts that "Connecticut has singled out a product developed and marketed outside of Connecticut upon which to seek to impose . . . massive costs." This argument does not appear in SPGGC's brief, and, in any event, is not supported by the factual allegations. On its face, the Connecticut statute applies equally to all sellers of gift cards

(Continued on following page)

476 U.S. at 580, 106 S.Ct. 2080. Were we to accept SPGGC's theory, almost every state consumer protection law would be considered "protectionist" in a sense prohibited by the Constitution. The meaning of the dormant Commerce Clause is far narrower. *See United Haulers*, 127 S.Ct. at 1796 ("The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition."). And because consumer protection is a field traditionally subject to state regulation, "[w]e should be particularly hesitant to interfere with the [State's] efforts under the guise of the Commerce Clause." *Id.*; *see Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41 (2d Cir.1990).

SPGGC fails to allege any facts tending to show, specifically, how the effects of the Gift Card Law might be projected into other states. The Attorney General has stipulated that the law applies only to sales of gift cards in Connecticut. Unlike the price-affirmation laws in *Healy* and *Brown-Forman*, the Gift Card Law does not, by its terms or its effects, directly regulate sales of gift cards in other states.

---

regardless of where they are located, and SPGGC provides no basis to assume that its application is different in practice. Moreover, "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987) (internal quotation marks omitted).

Nor does it prevent other states from regulating gift card sales differently within their own territories.

SPGGC argues that the Gift Card Law nonetheless operates as an extraterritorial restriction because it forces the costs of compliance onto out-of-state consumers. We do not agree that out-of-state consumers must inevitably be the ones to bear such costs. Instead, they could be passed on to Connecticut gift card consumers in the form of non-prohibited fees or else absorbed by SPGGC in the form of lower profits. In *Sorrell*, we rejected an argument virtually identical to the one SPGGC makes here. We observed that simply because a state regulation would force the regulated manufacturers to bear some of its costs, it does not automatically violate the Commerce Clause. *Sorrell*, 272 F.3d at 111.

SPGGC further argues that because Visa generally requires that payment cards carry an expiration date to operate on its network, the Gift Card Law would effectively ban Visa products in Connecticut and thereby impact the worldwide market for electronic payment instruments. This argument is significantly overstated. Even if the expiration date provisions of the Gift Card Law are not preempted as applied to the Simon Gift Card – a matter which the district court must consider on remand – the Law would not prohibit all Visa products from being sold (or used) in Connecticut. It would prohibit only the sale of gift cards subject to expiration dates, and even then would apply only to sellers who are not national banks. The fact that some of those sellers might be

companies that operate nationally or globally does not, on its own, establish a dormant Commerce Clause violation. *See CTS Corp.*, 481 U.S. at 88, 107 S.Ct. 1637.

Finally, SPGGC contends that insofar as the Connecticut Gift Card Law applies to gift cards sold via the Internet, it is inherently extraterritorial. In this regard, SPGGC relies heavily on *American Booksellers v. Dean*, where we commented in dicta that the Internet might "soon be seen as falling within the class of subjects that are protected from State regulation because they imperatively demand a single uniform rule." 342 F.3d at 104 (internal quotation marks and alterations omitted). *Dean* concerned a Vermont law prohibiting the distribution of indecent material to minors. In response to a challenge brought by the operators of websites containing sexually explicit material, we held that the law violated the First Amendment as well as the dormant Commerce Clause. Central to our decision was the district court's finding that then – current technology made it "difficult for 'publishers' who post information on the internet to limit website access to adult viewers or to viewers from certain states." *Id.* at 99. Because a person outside Vermont could not effectively prevent persons inside Vermont from accessing material posted on a website, out-of-state publishers were forced to comply with the Vermont statute or risk prosecution. *See id.* at 103. We therefore concluded that Vermont had projected its regulation onto the rest of the nation. *Id.*

In contrast to Internet publishers affected by the Vermont statute, SPGGC has readily available a near-perfect means of distinguishing between online consumers of the Simon Giftcard who reside in Connecticut and those who reside elsewhere – their credit card billing addresses. In *Dean*, we were concerned that visitors to websites featuring sexually explicit content might be forced to "forgo the anonymity otherwise available on the internet" if required to submit to an age-verification system. *Id.* at 99. But online gift card buyers, who must supply some form of payment information in order to complete a transaction, have no clear expectation of or interest in remaining anonymous. As a result, the analogy SPGGC urges us to draw between this case and *Dean* collapses.

The fact that an ordinary commercial transaction happens to occur in cyberspace does not insulate it from otherwise applicable state consumer protection laws. Accordingly, SPGGC does not state a valid claim for relief under the dormant Commerce Clause simply because it conducts business over the Internet. Based on the facts alleged, we see no risk that the Connecticut Gift Card Law will control sales of gift cards to anyone other than Connecticut consumers, whether such sales occur in person or online.

2. *Interstate Conflicts*

SPGGC also argues that the Connecticut statute burdens interstate commerce because it conflicts with

the laws of other states that regulate gift cards differently. In a series of cases dealing with state regulation of highway and railway transportation, the Supreme Court recognized that the existence of substantial regulatory conflicts between states may itself disproportionately burden interstate commerce. *See Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445-46, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *see also Sorrell*, 272 F.3d at 112.

In *Bibb*, the Court considered an Illinois statute that required the use of a certain type of mudguard on trucks and trailers that traversed the State's highways. 359 U.S. at 521-22, 79 S.Ct. 962. The statute prohibited the conventional mudguards that were legal in forty-five other states and that one other state, Arkansas, affirmatively required – "render[ing] the use of the same motor vehicle equipment in both [Illinois and Arkansas] impossible." *Id.* at 523, 79 S.Ct. 962. Thus, to move cargo from Arkansas to Illinois a carrier would have to either change vehicles or swap mudguards, causing significant delay. *Id.* at 526-27, 79 S.Ct. 962. The Illinois statute would also "seriously interfere[ ] with the 'interline' operations of motor carriers." *Id.* at 527, 79 S.Ct. 962. Although the statute was "nondiscriminatory," the Court concluded that it excessively burdened interstate commerce. *Id.* at 529, 79 S.Ct. 962. The Court emphasized

that it had not established a rule of *per se* illegality in this context, but that "[a] State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory." *Id.* at 529-30, 79 S.Ct. 962.

SPGGC contends that a similar burden would result from the collective operation of various state laws that regulate gift cards inconsistently. Because SPGGC sells its gift cards in multiple states, and because the cards themselves may sometimes travel across state lines, SPGGC suggests that regulation of gift cards, like regulation of mudguards, "is not one of those matters 'admitting of diversity of treatment, according to the special requirements of local conditions.'" *Id.* at 529, 79 S.Ct. 962 (quoting *Sproles v. Binford*, 286 U.S. 374, 390, 52 S.Ct. 581, 76 L.Ed. 1167 (1932)).

While SPGGC offers several examples of states that regulate gift cards differently from Connecticut, it has not identified any actual conflict of the sort at issue in *Bibb*. *See Sorrell*, 272 F.3d at 112 ("[T]here must be an actual conflict between the challenged regulation and those in place in other states."); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406-07, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) (O'Connor, J., concurring). Specifically, SPGGC has failed to identify any state, including Connecticut, that regulates gift cards in a way that would impede the interstate movement of gift cards subject

to different terms and conditions. That SPGGC may not be able to sell its gift cards on exactly the same terms to consumers in all states does not, in itself, demonstrate a regulatory conflict sufficient to establish that Connecticut's law is unconstitutional. Consumer protection matters are typically left to the control of the states precisely so that different states *can* apply different regulatory standards based on what is locally appropriate. This Court may "not sit as a superlegislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973) (internal quotation marks omitted).

It is clear from the facts alleged that the only real burden resulting from disparate state regulation of the Simon Giftcard is the burden of compliance that falls on SPGGC itself. That is not a sufficient basis on which to establish a dormant Commerce Clause claim where the state law at issue does not otherwise interfere with interstate commerce.

CONCLUSION

For the foregoing reasons, we AFFIRM in part and VACATE in part the district court's judgment, and REMAND the case for further proceedings consistent with this opinion.

United States Court of Appeals, First Circuit
SPGGC, LLC; Metabank; U.S. Bank, N.A.,
Plaintiffs-Appellees,
v.
Kelly A. AYOTTE, New Hampshire
Attorney General, Defendant, Appellant.
No. 06-2326.

9/13/07 ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Sandra L. Lynch. Senior Circuit Judge A. Tashima and Judge Kermit V. Lipez: The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.